(15)

No. 04-1327

NOV 30 2005

In The

Supreme Court of the United States

BOBBY LEE HOLMES,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of South Carolina

JOINT APPENDIX
VOLUME II, Pages 196 to 372

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STATE OF SOUTH CAROLINA)
) IN THE COURT OF
) GENERAL SESSIONS
COUNTY OF YORK)

THE STATE) TRANSCRIPT OF RECORD
) 90-GS-46-1196
-vs-) 90-GS-46-1197
) 90-GS-46-1198
BOBBY LEE HOLMES,) 90-GS-46-1200
) MARCH 19, 2001
Defendant.) YORK, SOUTH CAROLINA

VOLUME VIII

BEFORE

HONORABLE JOHN C. HAYES, III, JUDGE; and a Jury.

APPEARANCES:

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Attorney for the Defendant.

* * *

[In Camera Hearing On Use Of Third-Party Guilt Evidence To Impeach The Investigation]

[2683] MR. POPE: I mean, again, we end up doing exactly what you have ruled we can't do, is interjecting Jimmy White as some mystery man in this thing. You said they could ask if they had other investigations. They can't get in putting pictures of Jimmy White up. They can't get in the Jimmy White confessions, or did you talk to Jimmy White, leaving some trail. That's not a reasonable doubt. That is a collateral matter, as you have already ruled, Your Honor, and that's exactly where we are taking this thing. We just need a concrete ruling so we can operate within it.

THE COURT: Well, I thought I just did, as concrete as I can. I'm not – and that is, if they – if they – whatever they did in their investigation I think is fair game.

MR. POPE: So they can say – they can ask specifically about Jimmy White? Is that what the court is ruling?

THE COURT: Well, if they had him come in and give a statement, yes.

MR. NETTLES: Your Honor, additionally I would point out, and I think one of the other things we made abundantly clear through – and the reason this [2684] is important is this is all before any criminal defense lawyers got involved, four months after this crime took place, they bring Jimmy White in. They asked – and this is all in the record, since we did this all pretrial, and this is all done, you know, under oath, subject to cross-examination. Jimmy White came in and said "I was with

Junior Lytle." Okay. And that's what he said in his statement four months after this took place.

They immediately – and this is part of the investigation, Your Honor. That's how you investigate the veracity of the statement. They went to talked to Junior Lytle. Junior Lytle said "I never saw him that night."

Then my point would then be, with that information, they didn't take his clothes, they didn't take his shoes, they didn't take his fingerprints. I think the fact that there is a picture of him at the time that this took place where he's got longish hair. I think that's relevant, especially in light of the fact that – and let's be clear, that they're the people that moved in the fact that the man had longish hair.

I'm just laying the court out in very general terms that's where I plan to go with this [2685] cross-examination.

THE COURT: Well, I'm going to limit it to – I'm not – again, it's a fine line. I'm going to limit it to you inquiring, like I said, about whether there were other suspects. And if he says no, then I don't know where we go from there.

But if he says yes, then I think they have got a right to know who why they ruled that suspect out.

* * *

[State Witness Officer William C. Mobley – Cross By Mr. Nettles (Proffered Testimony)]

[2695] Now let me ask you this. Did you take Jimmy White's clothes into evidence?

A No.

Q Did you take Jimmy White's shoes into evidence?

A No.

Q You did draw blood from Jimmy White?

A Yes.

Q Okay. You did take Jimmy White's fingerprints?

A That's correct.

Q Jimmy White had longer hair than Bobby Holmes at the time this crime took place?

A That's correct.

Q You went – during the course of this investigation you went door to door seeking information from people about the facts – about this crime?

A That's correct.

[2696] Q You received information that Jimmy White was in the neighborhood around the time that this crime was to have taken place?

A Not at that time.

Q You didn't – you didn't receive information from Neshelley Gilmore that Jimmy White was standing in the parking lot around the time that this crime took place?

A I don't recall a statement from Neshelley Gilmore at that particular time.

Q Okay.

A I think she made a statement that come out sometime later.

Q You were aware that Jimmy White has made statements to people that he is the person who did this?

A There are conflicting statements that – my understanding about – are we going into hearsay?

THE COURT: Right now he's asking you – the jury is not in here. If you just answer what he asks.

A There is conflicting statements. I think we have talked to some of the individuals.

* * *

[2710] THE COURT: This is very difficult, but looking at Gay, in Gay, Judge Cooper, after a proffer, did not allow testimony regarding certain information developed through the police interviews. And that's on page 69 of the advance sheets. The court seemed to look at the third-party guilt in sort of a package context. And to quote our solicitor, it's either got to be fish or fowl. And that is where I find myself.

I'm going to, in essence, restructure my ruling and I find that it's premature for the court to allow any evidence regarding third-party guilt, whether through investigation or as substantive evidence, until such time as the State is equipped with enough to make a decision that the totality of the evidence falls within the Gregory standard. Until that time, I find that it's not relevant.

It's certainly – I know I guess you could argue that it perhaps it is impeachment evidence. I'm not sure what would be impeaching, but I'm – I feel like I'm bound by the latest pronouncement of the court, and that is at some point, once I can rule, I can – I may be in the position to rule whether we can go into third-party guilt or not [2711]

before we get there, we are going to have to stay away from it. So I'm precluding those line of questions.

* * *

[2713] MR. NETTLES: Okay, that's fine. That's just what I need to know. The court has ruled that I can't discuss in any way, shape or form the investigation of anyone else in relation to the commission of this crime?

THE COURT: That's the ruling.

MR. NETTLES: Okay.

THE COURT: And for your benefit, and I don't think that this would be considered a motion in limine, because we are in the middle of a trial –

MR. NETTLES: Right.

[2714] THE COURT: – and been proffered.

MR. NETTLES: Right.

THE COURT: I feel this is the time to make it and the time –

MR. NETTLES: Yes, sir.

THE COURT: – to rule, and I don't feel like you need to – I think you are protected. I don't think that you need to keep turning to me every time and say, Your Honor –

MR. NETTLES: It is.

THE COURT: – here is where I would ask one of those questions.

MR. NETTLES: Thank you.

THE COURT: Because I just think that's not what the courts require, but I don't want you to be in a situation where you go up and the court says, well, the judge just made a preliminary ruling. This isn't a preliminary ruling. This one is long, long and hard thought out to the degree I'm capable of it, well thought out, and that is the ruling.

MR. NETTLES: Okay. Your Honor, I would like, for the record, that by not allowing this, it violates Mr. Holmes right to a fair trial secured by – to my client by the Due Process Clause of the United States, secured by the state and federal [2715] constitutional right to present a complete and adequate defense, as contained in Washington v. Texas, and the right to effective cross-examination under the right to confront them with the state and with the federal constitution. Thank you.

* * *

[Jury Seated]

* * *

[State's Witness Officer William C. Mobley –
Cross By Mr. Nettles]

[2727] Q In this whole house you only found two fingerprints?

A That's correct.

Q In this case you seized the phone, correct?

A That's correct.

Q Where is the pocketbook that you seized?

[2728] A I gave it back to the victim's family. They were needing her Medicaid card and the information –

Q Okay.

A – for the hospital.

Q And her Medicaid card or information was written on the pocketbook?

A No, it was in the pocketbook.

Q But you didn't retrieve – you didn't maintain the pocketbook, did you?

A No, sir, we processed the pocketbook. There was nothing found on it. We released it to the family.

* * *

[2734] Q Now, in the tape Ms. Stewart is saying "the phone. The phone." She's calling to you to check the phone, isn't she?

A She said possibly there was prints on the phone.

Q She's going "the pocketbook." She is saying "the pocketbook?"

A Yes.

Q "Check the pocketbook."

A We checked the phone and the pocketbook.

Q And you didn't maintain them, did you?

A Yes.

Q Well, that's maintained?

A Not now.

[2735] Q Okay. And so after you checked the phone, you checked the phone, you decided there weren't any fingerprints?

A Did not see any fingerprints.

Q And did you decide that there weren't any fingerprints?

A I decided there were no fingerprints.

Q You listened to the tape?

A Sometime.

Q Within a couple of days. You and I have agreed on that, right?

A Yes.

Q You listened to the tape?

A Yes.

Q And then you didn't say wow, I better send this phone to SLED because this lady is very adamant about the fact that this man touched the phone? You didn't do that, did you?

A No.

Q And with the pocketbook, it's the same thing. You, as not an expert, made a decision that there were no fingerprints on the pocketbook, right?

A That's right.

* * *

[2737] MR. NETTLES: At this time, Your Honor, we would Defense 9 into evidence.

THE COURT: Without objection?

MR. POPE: That is correct, Your Honor.

THE COURT: Okay.

Q This is a shoe print?

A Yes.

Q Shoe print is evidence?

A Yes, sir.

Q As a matter of fact, there is one defined shoe print here, correct?

A Appears to be, yes.

Q And then there appears to be another one here, right?

A I can't see.

Q Well, let me bring it a little closer for you.

A Yes.

* * *

[2747] Q Now, where was that foot – you don't have a document – we have got this – yesterday we looked at this – we looked at the crime scene, this. All right. This is the only – other than the pictures [2748] that you took, this is the only diagram we have of the apartment, correct?

A That's correct.

Q You don't mark the footprint on there anywhere, do you?

A No, sir.

Q Well, you took the time to write bathtub, right?

A Yes, sir.

Q You wrote bedroom, and that had some significance. We wanted to know where the assault took place, right?

A Yes.

Q You wrote sink, bedroom, furnace, lamp, china. You didn't – you didn't – there is no doubt that footprint came out of this apartment, right?

A That's correct.

Q Okay. But you didn't document where, did you?

A Well, I didn't make the chart there.

Q Is there any other chart where you document where it was done?

A No, sir.

* * *

[2754] Q Okay. Now, no one has identified him, correct? I mean, you haven't showed any photo lineups to anybody taht said I saw that guy there, have you?

A No.

* * *

[2755] Q And you arrived at 8:46, correct?

A Yes.

Q Okay. You gathered the evidence from Ms. Stewart's apartment?

A Yes.

Q As a matter of fact, you kind of came in and then you sent everybody out, you closed the door, you locked the door, and then you began to process the crime scene alone, correct?

A That's correct.

Q Okay. Now, at 11:18, you left her apartment with all the clothing that you gathered from that location and – correct?

A That's correct.

Q And you went to discuss this case with the other officers involved?

A Yes.

Q Okay. Now, at that point you had clothes, right?

A Yes.

Q You had two fingerprints, which you didn't know [2756] who had done them?

A That's correct.

Q You didn't know whose prints they were. For all you knew, they could have been EMS person's prints?

A That's correct.

Q They could have been Ms. Stewart's prints?

A That's correct.

Q They could have been any of the officers prints?

A That's correct.

* * *

[2777] (Photograph of Defendant Bobby Holmes marked as Defendant's Exhibit No. 39 for identification)

Q This reflects how he looked when you arrested him that day, the day he was arrested?

A Yes, sir.

MR. NETTLES: At this time I would move Defense Exhibit 39 into evidence, Your Honor.

MR. POPE: Without objection, Your Honor.

THE COURT: It would be received.

MR. NETTLES: Thank you.

Q You would agree with me – and we have talked about this. You would agree with me that this hair is shorter than Mr. Barnett's was at the time that this picture was taken?

A Shorter than –

Q Lieutenant Barnett's hair was.

A Was?

Q Yes, at the time this picture was taken.

A In 1989?

Q Yes, sir.

A Possibly, yes, sir.

Q You would agree with me that that is not longish hair, correct?

[2778] A That's correct.

Q Ms. Stewart said he had longish hair?

A Long, not too long, yes, sir.

Q Ms. Stewart said the man was in his middle aged late twenties, correct?

A I believe that's a correct statement.

Q Bobby Holmes was seventeen, eighteen years old when he was arrested?

A Yes, sir.

Q You questioned Bobby Holmes?

A Yes, sir.

Q Bobby Holmes has always denied that he committed this crime?

A Yes, sir.

* * *

[State's Witness SLED Agent Steven Derrick – Direct by Mr. Pope]

[2870] Q Okay. Did you have an opportunity to observe the interior door where the – and I would refer you to State's Exhibit 14. Did you have an opportunity to observe the interior door of that apartment?

A Yes, sir.

Q Do you recall whether if had been processed at the time that you saw it?

A Yes, sir, to the best of my memory, the fingerprint powder was still present on the door, all except one area, which indicated that a section of it had been lifted out.

Q Did you ultimately receive the lifts that actually came from both the interior of the door and the exterior of the door?

A Yes, sir, I received them that day while we were there.

Q Okay. And I show you Defendant's Exhibit 6, State's Exhibit 16, and ask if you had an opportunity to look at those?

A Yes, sir, I have.

* * *

[2876] Q In this particular case what were the ultimate results of your examination? You had two items that you were able to look at. The fingerprint from the outside, let's begin with it. The fingerprint on the outside of the door, were you able to match that to anybody?

A No, sir, I was not.

Q Okay. Let me ask you, did you obtain the victim's fingerprints to compare with that outside fingerprint?

A No, sir, I did not.

Q And why was that?

A The day that myself and Agent Gainey were there, was in York, the victim was in the hospital and we were not able to get to the victim to obtain known inked standard because of her health condition. Subsequently later it was, I understand, that she had died, but we were not made aware of that fact until after her funeral services. Therefore, we did not get any known inked standards from her and did not know of any existing one for personal identification.

Q So as far as the external print, you have no means – you have not identified who that is, is [2877] that correct?

A No, sir.

Q Okay. What were the results on the internal print?

A The internal print, which was the partial palm, was identified to the inked standards of Mr. Bobby Holmes.

Q Okay. You had indicated earlier that you had talked about orientation, as far as using the left hand. Can you describe to the jury how you arrived at that?

A In looking at the latent itself, within the latent I can see the edge of the hand, using this hand, specifically left hand. I can see where the ridges end and I can see where the other skin formation begins.

Knowing how ridges flow, in this particular area of the hand, with their movement in motion, immediately led me to start my examination on the left hand, by the ridge flow and the mere fact that my ridges ended and I could see the edge of the hand itself.

Q Did you have the opportunity to compare the lift – and also you said you went and looked at the door, but at that point the area had been removed, [2878] the tape had been removed, is that correct?

A That's correct, there was an area where something had been lifted away.

Q Okay. Did you have an opportunity to look at State's Exhibit 14 to determine if you saw where the orientation of the print on the door?

A Yes, sir.

Q Okay. Could you explain to the jury, based on your examination, the orientation of the print on the door? Perhaps if you would step down, please, sir.

A Yes, sir.

(witness off the witness stand)

Q If you would explain. You said it's from the left hand, is that correct?

A That's correct.

Q Okay. And could you indicate to the jury the orientation of that print?

A Using the photograph and finding an outlaid pattern that corresponds to the pattern from the lift, the orientation would be fingers down, palm making contact with the door in this manner.

Q Okay. Could you then orient the jury on State's Exhibit 15? You might have to step up for them to see and show them the orientation of that [2879] print?

A Yes, sir.

Q So is it fair to say on State's Exhibit 15, the tape is to the right of the print, as properly oriented as it would have been on the door?

A Yes, sir.

Q And so the State's label is at the top of that, is that correct?

A That is correct.

Q Okay. Thank you, sir.

Did you also prepare a diagram to explain to the jury your identification?

A Yes, sir, I did.

(witness back on the witness stand)

Q And do you feel that it would assist the jury in understanding the comparison points that you have indicated?

A Yes, sir.

Q Okay.

(Poster of Lifted Print and Inked Print marked as State's Exhibit No. 33 for identification)

BY MR. POPE:

Q Does this accurately depict items of evidence, the inked print and the lifted print that you looked at?

[2880] A That's correct.

MR. POPE: Your Honor, I move State's Exhibit 33 for identification into evidence.

MR. MACDOUGALL: Without objection, Your Honor.

MR. POPE: It would be received, without objection.

BY MR. POPE:

Q Agent, if you could, I would ask that you step down and explain as you have the identification of the print and explain to the jury what your diagram depicts, if you would?

A May I step down?

MR. POPE: Yes, sir.

(witness off the witness stand)

BY MR. POPE:

Q Would it assist you if I hold it for you, or can you hold it yourself?

MR. POPE: Counsel, y'all position yourself where you can see over there.

Wait just a second.

THE WITNESS: Yes, sir.

A What I have before you is enlarged photographs and properly labeled, this being an enlarged photograph of the latent print, the latent lift that I just had my hand on a second ago, and an enlarged [2881] photograph of that section of the left palm of Bobby Lee Holmes, the known inked prints.

You will see in both of these photographs that I have a number of arrows and numbers corresponding to both the inked print and in the latent print. These corresponding lines or numbers go to those points of identification that I spoke of earlier that correspond both in the inked print and in the latent print.

Using point No. 1, which is represented in both, the inked and the latent print, this is one of those ridges that starts off as a single ridge, divides off having two ridges that continue to flow in the pattern.

Point 1 of the inked is in the same unit relationship as point 1 in the latent.

Coming down to approximately five ridge counts, the next point is actually point No. 12 that I have on here. You see, this is a ridge that starts off in a pattern and then it abruptly stops and ends, while the ridges next to it continue to flow in the pattern surrounding it.

Coming down another ridge count – correction, three ridge counts, and we come up to point No. 2. And again this is another ending ridge.

[2882] Throughout these twelve points that I have charted here, these are these ending ridges, dividing ridges, and short ridges that are represented in both the latent and in the known inked standard.

This is just twelve of approximately fifty of these points of identification that were in the same unit relationship in both inked and latent print, thus making the identification of this latent with a known inked standard of Bobby Lee Holmes.

Q Does that again mean that that match is unique to Bobby Holmes and no one else in the world?

A That's correct.

* * *

[SLED Agent Steven Derrick –
Cross By Mr. MacDougall]

[2896] Q Agent Derrick, we are looking at what's been marked State's Exhibit 16.

A Yes, sir.

Q I believe you looked at that in detail.

A Yes.

Q It's what I'll call sideways, in the sense that it's oriented left to right rather than up and down.

A Okay, sir.

Q And do you see within the print some series of vertical lines?

A Yes, sir.

Q Now, in any print there is – the impressions are made by the ridge lines and there was also any artifacts that appear in the surface. Do you agree with that?

A Yes, sir, especially on a rough surface.

Q I understand that. And those lines, I'll call them striations, appear to have been on the original surface where that lift was taken. Do you agree with that?

A Yes, sir.

Q And that could be paintbrush lines, or it could be wood grain, or it could be any other abnormality?

A Yes, sir.

[2897] Q But you agree that those vertical lines, which, because of the orientation of the printer at the moment horizontal are, are artifact from the surface on which that print was taken?

A I would totally agree.

Q I'm going to now show you Defendant's Exhibit 6 in evidence and I'll ask you if that print, as it's projected there, is consistent with what you examined?

A Yes, sir.

Q And that's the print from the front of the door. We just looked at the print from inside of the door. Do you agree with that?

A Yes, sir, based on what was labeled on.

Q Exactly. Now, looking at the print from the outside of the door, which I believe was also the print that did not have a diagram, do you see any striations there at all?

A No, sir.

Q Would that indicate to you then that that print was taken from a surface different from the print that we just looked at, the palm blade print with the striations?

A It would have been lifted from a smoother surface, but also by all the grain in the smaller [2898] dots away from it, it would indicate to me that it would be a surface that would probably be dirty or something had built up or adhered to it, thus allowing the fingerprint powder to adhere to all the little dots that's out and around from the latent print itself.

Q And you see little of that on the State's Exhibit 6, the print from the inside of the door?

A That's correct.

Q Okay. So the print that we are looking at on the outside of the door, to sum up, has no striations and appears to be a different kind of surface than the print on the inside of the door with the striations?

A That's correct.

* * *

[2907] MR. MACDOUGALL: I take it that you have trained new investigators and new agents, and the reason that they have someone like you training them is that you have much to teach them?

A Yes, sir.

Q You know things by virtue of experience and other training that they just don't know?

A Yes, sir, that's a fair statement.

Q And part of that translates into what I'll call the art of what you do?

A Yes, sir.

Q Recognize things that other people won't recognize? You see things that other people won't see, is that correct?

A That's a fair statement, yes.

Q And that could extend to fingerprints as well, couldn't it?

A Yes, sir.

Q In other words, I could take a forty hour course and be given a, you know, a toaster in a kitchen that supposedly was handled by a criminal and I could work on it and maybe I could find some prints and maybe I wouldn't. I could turn it over to you and you might find some things that I wouldn't find?

[2908] A Yes, sir.

Q In fact, you would be likely to, with as much experience as you have?

A Yes, sir.

Q Now, given that fact, dusting is not the only method of detecting prints, is it?

A No, sir.

Q And another way of saying it is one man's smudge is another man's fingerprint?

A I hadn't heard it put quite that way, but yes, sir.

Q You wouldn't disagree with that?

A No.

Q What I would like you to help me with, Agent Derrick, is talking about some of those other ways that fingerprints are processed. I have heard references to super glue and a glue tank. Is the more technical term for that cyanoacrylate fuming?

A Yes, sir, that's correct.

Q Would you tell how that works?

A What it is it's the cyanoacrylate that is in super glue that bonds to the greases and oil and the residue that is transferred from the fingers to a surface. There are number of ways that this could be done. The fastest more efficient way is the one [2909] that he spoke of using a tank. Applying a heat source to the liquid glue, changing it from a liquid to a vapor. And as this vapor expends out in the tank and over the object that's being fumed, it will adhere to this residue that transferred from the fingers to that surface.

Q There is also a method involving lasers and alternative light, is that correct?

A Yes, sir.

Q Would you tell us how that works?

A Keep in mind under today's use of alternate light and the capabilities of laser and alternate light in 1989 and 1990 is a lot different.

I had an opportunity to go train under Dr. Menzel, who is the one that had the first publication of using a laser and chemical dye stains to make invisible prints visible by using a light laser, which is a laser that alternates light from the general light that we see here and causes these chemicals to fluoresce, allowing the examiner to photograph this ridge detail and do an examination.

The laser in 1989, 1990 was kind of where the science fingerprints was in America in 1933. It was on its foundation. At one point in time we had a laser at SLED, but because of its lack of [2910] effectness, we donated it to a university and we went to a system of using alternate light systems, which we can – this system can break light down into certain spectrums, using certain chemicals that will get excited by this light, causing them to fluoresce. This is just another aid or a tool in enhancing more so than developing latent prints on objects.

Dealing with the solid objects that counsel spoke of a little bit ago with the cyanoacrylate fuming, that's normally the first stage. And when appropriate chemicals are applied to it, that will adhere to this bonded super glue, causing it to fluoresce in making this print with a contrasting background and show better visibility to me as the examiner.

Q Now, it's correct, isn't it, that the glue tank, super glue, really only works with nonporous materials, is that right?

A That's correct, hard objects, glass, metal?

Q Like a telephone?

A Sure.

Q Okay. And that alternative light is really the best – that's the alternative method for looking at porous objects?

[2911] A I don't know that I would agree that it's the best. It's one of the tools.

Q Let me exemplify that or simplify that. If I was dealing with a black telephone and I cyanoacrylated it, when the glue adheres to this black telephone, it's going to outline the ridge detail in white. So I have basically a reverse of the latent lift I had here, which was a white background with black powder. The cyanoacrylate would be white detail on black background.

In that particular case there is no need to use an alternate light system. A simple photograph would capture the same thing that the alternate light and fluorescent dyes would capture.

Q I guess I asked the question in not the best way. Specifically cyanoacrylate fuming is only useful for non-porous specimens is my point?

A Yes, sir.

Q That purse, for example, could not be something that would be subjected to cyanoacrylate successfully?

A Yes, it could, depending on the makeup of the purse.

Q Leather?

A If it's a leather purse, then there was a [2912] potential that the fuming would work on it.

* * *

[2914] Q In this case, Agent Derrick, were you given anything other than these two lift cards to analyze?

A No, sir.

Q Okay. Were there any objects that you were given up to this date to apply DFO or alternate light to?

A No, sir.

Q Or the glue tank, for that matter?

A No, sir.

Q I'd like to ask you specifically about a process called physical developer, PD. Are you familiar with PD?

A Yes, sir.

[2915] Q What is PD used for?

A Physical developer, that is basically a final stage that is used on paper and cardboard items.

Q And one of the things that's particularly used on by people in your line of work is currency?

A Yes, sir.

Q Is that correct?

A Yes.

Q So if I go out and rob a bank and the dye markers aren't in there, but I'm later found to be spending hundred dollar bills that I didn't have before, one way you would prove me guilty would be to use PD on that currency?

A The physical developer, yes, sir.

Q Okay. Now, if I had currency that I believed had been stolen from a crime victim, one of the things that I could use was PD, isn't it?

A Yes, sir, it could be.

Q And I could look on that currency, using PD, and see if I could find fingerprints of the victim of the crime?

A That's correct.

Q And that would be suggestive of whoever that currency might have some explaining to do with respect to that currency, is that right?

[2916] A Well, let me back up to my last answer. Yes, you could find the ridge detail. Whose ridge detail it was would result in the comparison identification.

Q Okay. But let me –

A May not be the person that committed the crime, but whoever handled the money.

Q Let me ask you this. Did anyone ever tell you that there was some currency involved in this case?

A Not that I recall.

Q And you were not given any currency to test, were you?

A No, sir.

Q But had you been given currency to test, you could have used PD to look for prints on it, is that correct?

A I don't believe we had the physical developer capability in 1989 or '90. Physical developer arose out of the old silver nitrate formerly. And it was a modified silver nitrate that physical developer is named for, because the old silver nitrate technique was so very light sensitive, that it could develop a print and then overexpose it in a matter of minutes. And I don't exactly recall when physical developer came on line with us, but I don't believe that was [2917] available in 1990.

Q But the FBI had it?

A But if they did, I wasn't aware of it.

Q Today, or any time in the last eleven years, you have never been given currency to test using PD, have you in this case?

A No, sir.

Q And, in fact, you don't have the known of the victim, Ms. Stewart, in this case to compare it to, do you?

A No, sir.

Q Okay. And, in fact, you never took a known, despite the fact that she lived for several months after the attack?

A No, sir.

Q How about vacuum metal deposition? That's used to develop latent prints on nonporous specimens, like a purse, is that right?

A That's correct, sir, yes, sir.

Q You are familiar with that?

A I'm familiar with the formulation and technique, but it's not one that we use at SLED.

Q Okay. But it's an acceptable process, one that's used by the FBI?

A Yes, sir. Originally came from the home office [2918] in England.

Q And you were never given a purse or any other items, porous item, to test using vacuum metal deposition?

A No, sir.

Q How about an ninhydrin acetone base? That's used for porous surfaces as well?

A Yes, sir, we use an ninhydrin with a different carrier. Acetone is the carrier. An ninhydrin is actually the chemical that develops the latent. And there are a number of carriers that could be used. That's one of them. But in using documents, acetone makes things run, so we use another carrier which is less likely to make it run.

Q So you were never given a phone?

A No, sir, not to my knowledge.

Q You were never given a purse?

A Not to my knowledge.

Q You were never given any currency?

A No, sir.

Q In fact, the only things that you were given are those two lift prints, those two lift cards that we have been talking about?

A That's correct.

Q And the only person in the world who knows [2919] where those lifts cards came from is Captain Mobley?

A I wasn't there when they were lifted, so I can't answer it. I know that –

Q You sure don't know?

A I don't know.

Q Okay.

* * *

[State's Witness SLED Agent John Barron –
Direct By Mr. Pope]

[2997] Q Agent Barron, based on the results of your testing, how many different matches did you find?

A Well, I found four distinct fibers. The black cotton polyester could be considered as one unit, so three or four matches, depending upon how you want to look at it.

Q Could you list the matches for the jury, the fiber that you found that's matching the item?

A Yes, the black cotton polyester that came from the bed clothing were matching the black cotton polyester fibers from the hooded shirt, hooded jacket.

Q There was a blue acrylic fiber recovered from the defendant's blue jeans that matched a blue acrylic fiber from the pink nightgown of the victim.

* * *

[SLED Agent John Barron –
Cross By Mr. MacDougall]

[3018] Q But you didn't use the taping method here. You used the scraping method, isn't that right, Mr. Barron?

A I used the method that I was trained to use.

Q But it was the scraping method. There is nothing to be ashamed of. It was scraping method, right?

A That's correct.

* * *

[3020] Q Mr. Barron, if I could ask you, please, my question – you are welcome to explain it beyond this, but how many clean rooms did you have?

A In 1990, we had one.

Q You had one. So that in 1990, knowns and unknowns were opened in the same room, is that correct?

A Yes, they were.

* * *

[3028] MR. MACDOUGALL: Now, I would like to talk to you specifically about those. In one instance I believe you testified that you found a gold modacrylic fiber on a pink nightgown, is that correct?

A Correct.

Q And you found a brown modacrylic fiber on a pair of underwear?

A Yes, sir. I called it brown because there was more than one fiber clumped together. It appeared to be brown to my visual color scheme, if you will.

Q We will get to that, but with respect to those fibers, neither the – well, let me ask it separately.

The gold fiber that you testified that you found in the pink nightgown was not taken from the undershorts? In a sense it was not a part of the undershorts, is that right?

A That's correct.

Q And in reverse, the brown modacrylic fiber on the undershorts was not – the cutting, it wasn't part of the nightgown, was it?

A That's correct.

Q So both of those fibers came from some place else? Do you agree with?

[3029] A I agree with that.

Q Mr. Barron, I'm going to show you a diagram that prepared to illustrate that testimony. I would like you to take a look at it and tell me if it accurately depicts what you just testified to?

A Yes, sir.

Q Okay. Would it be helpful to the jury to be able to see that diagram?

A I suppose.

Q Mr. Barron, can you see the chart from where you are?

A Yes, I can.

Q So your testimony with respect to the modacrylic fiber –

THE COURT: Can all the jurors see it?

MR. MACDOUGALL:

Q Mr. Barron, can you still see it?

A Yes, sir.

Q With regard to the gold and brown modacrylic fiber, your testimony is that from some unknown source, a gold modacrylic fiber was found on the pink nightgown?

A Right. I do not know the source of the gold modacrylic fiber.

Q That's why it's an unknown source.

[3030] A Right.

Q And from an unknown source, a brown modacrylic fiber ball was found in the underwear?

A Correct.

Q Okay. But where that came from is not something that you are testifying to today, because you don't know, do you?

A Correct.

Q Where either of those fibers came from?

A No, I just know they were found in both those garments.

* * *

[3034] Q I'm going to show you what's been previously admitted into evidence as State's Exhibit 16. Have you ever seen this before?

A No, sir.

Q Well, let me tell you what this is. This is a photograph taken of the bedroom of the victim's [3035] apartment the day after the attack.

A Okay.

Q Have a look on the floor, Mr. Barron. What do you see?

A A multicolored rug.

Q A multicolored rug. Sort of like the one Professor Needles was talking about that are frequently made from modacrylics?

A Rugs. Yeah, modacrylics are used in rugs.

Q They are. And do you see gold in there?

A Yes, sir.

Q Do you see brown in there?

A I see –

Q Pretty much every color, isn't that right?

A Yeah.

Q You can get pretty much whatever you want out of that rug?

A Correct.

Q Okay. Did you ever leave something on the floor of your bedroom?

A Did I ever leave something on the floor of my bedroom?

Q I sure have. Have you?

A Sure.

Q Yeah. Now, did any of police officers, I think [3036] you referred to them as the investigating agency, show you this picture?

A No.

Q Did they bring you this gold rug with the brown in it?

A No, sir.

Q Did they ask if you had anything else you wanted to look at from the apartment?

A No, sir.

Q Okay. With your unknown source and this picture I have just showed you of the crime scene, Mr. Barron, I bet you would have wanted to analyze that rug, wouldn't you?

A That would have been a good thing to do.

Q Might have been the unknown source?

A Could have been.

Q At least for the nightgown, right, the gold?

A Correct. Could have been the source of –

Q Could have been all kinds of things?

A Could have been.

Q It could have been all kinds of things. But, you know, the fact is we don't know, do we?

A Right.

Q And we are never going to know?

A Right.

* * *

[3038] Q Let's talk about the blue acrylic fibers on the pink nightgown. There is some similarity here, in the sense that the blue acrylic fiber is not part of the pink nightgown, is it?

A No, it is not.

Q And the blue acrylic fiber is not part of the blue jeans, is it?

A No, sir.

* * *

STATE OF SOUTH CAROLINA)
) IN THE COURT OF
COUNTY OF YORK) GENERAL SESSIONS

THE STATE) TRANSCRIPT OF RECORD
) 90-GS-46-1196
-vs-) 90-GS-46-1197
) 90-GS-46-1198
BOBBY LEE HOLMES,) 90-GS-46-1200
) MARCH 19, 2001
Defendant.) YORK, SOUTH CAROLINA

VOLUME IX

BEFORE:

HONORABLE JOHN C. HAYES, III, JUDGE; and a Jury.

APPEARANCES:

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* * *

[State's Witness SLED Agent Nancy Greene –
Direct By Mr. Pope]

[3169] Q Okay. And did you, in fact, receive a number of items of evidence in this particular case?

A Yes, I did.

* * *

[3172] Q Among those items, you received items from rape or suspect kits, is that correct?

A That is correct.

Q Okay. And, particularly, can you tell the jury what type items you received from the rape or suspect kit?

A Yes, in a rape or a suspect kit – well, let's say a rape kit. Items that are generally included in rape kit are the known standards from the victim and also any evidence that the physician collects, say, on swabs and that from a vaginal examination at the hospital.

And from a suspect kit, what I receive are the known standards from the suspect and blood and usually saliva samples.

Q Let me ask you. In South Carolina, we call them rape kits, sexual assault kits, where do they come from? Who provides them to the hospitals and to law enforcement?

A We keep them – the SLED laboratory, it's their responsibility to make sure that the hospitals have their supplies. They are ordered by the ordering department at SLED.

* * *

[3182] Q And that paper towel, what were the results of that?

A No semen was identified on that, but human blood was identified.

Q I refer you to I believe it's SLED No. 8. You had an opportunity to previously look at the evidence, is that correct?

A Yes, I have.

Q And I believe SLED No. 8, the blue tank top, recovered on the dog trail, that would be your SLED No. 8, State's 18?

A Blue tank top.

Q Okay. What –

A No. 8.

Q What's the result of that test?

A No blood identified.

Q Were you able to find anything from that item?

A No, I was not.

Q Agent Greene, in looking at your report, there were a number of places that you identified human blood, but could not characterize it further, is that correct?

A That is correct.

[3183] Q The places, of course with the exception of the defendant's known sample, which you identified, all other blood that you were able to identify was consistent with the victim, is that correct?

A That is correct, it was consistent with coming from the victim.

Q And based on your testing, I believe there was no indication of semen or spermatozoa from any of the testing that you did?

A That is correct.

* * *

[SLED Agent Nancy Greene – Cross By Mr. Nettles]

[3208] Q And the underwear, you able to – how big was the spot of blood on that?

A That was not very – that was not near as large.

Q Okay.

[3209] A It was a very much smaller amount.

Q But you didn't need a microscope to see it?

A No.

Q Okay. And the tank top, how large was the blood on the tank top?

A The tank top, it was not very large stain, but you could tell that it was a stain.

* * *

[State's Witness FBI Agent Frank Samuel Baechtel – Cross By Mr. MacDougall (Profferred Testimony)]

[3301] Q Let me – let me try to – I'm sorry I'm having a little difficulty with this, associate that with specific evidence, and this is more for my own understanding, certainly than yours.

The way I read this is that Q-4, the nightgown cutting assumed to be Mrs. Stewart –

A Yes.

[3302] Q – and K-1, the defendant's DNA, cannot be excluded as sources for the mixture that is found in the defendant's shirt, underpants, and the towel taken from the house. Do you agree with that?

A Yes.

* * *

[FBI Agent Frank Samuel Baechtel –
Redirect By Mr. Pope (Profferred Testimony)]

[3306] MR. POPE: I have one more question, just for the court. Your Honor, this is clearly just for purposes of the court's consideration for the third-party issues.

REDIRECT EXAMINATION BY MR. POPE:

Q Did you also have the opportunity to receive a subsequent sample, I think they were K4 – 3 and K4? This would be on your second report?

A Yes, I did.

Q Do you have that before you, sir?

A I have some information about that, yes, sir.

Q In regards to K4, the dried bloodstain of James White?

A Yes, sir.

Q Do you have that information?

A I do.

Q What were the results of your testing, when taking James White's DNA, as far as comparing it [3307] with these mixtures that you discussed?

A He's excluded.

Q And is that from all items that you tested?

A Yes, sir.

* * *

[State's Witness SLED Agent Lori Johnson – Direct By Mr. Pope]

[3333] Q During the time period when you were working at the DNA lab on this case, did you also act as somewhat of a liaison between the FBI and the local agency?

A Yes, sir, I did. Initially I wrote the letter to the FBI that accompanied the evidence when it was sent up for analysis. That letter, I provided the FBI with a list of the items being submitted for analysis. And I also told them a bit about the case, for their information.

I mentioned earlier that I incorrectly listed the item number for Bobby Holmes as 5.4.2, when it was actually 6.3.1.

In this same letter I also told the FBI that the victim, Mary Stewart, was caucasian, when she was, in fact, black.

* * *

[State's Witness SLED Agent Lori Johnson –
Cross By Mr. Nettles]

[3361] Q And you had in your possession, you had 5.4.2?

A That's correct.

Q Correct?

A Yes.

Q Okay. And that 5.4.2 had not been split in half, as 4.4.1 had?

A That's correct.

Q That 5.4.2 was gathered by, we have to assume, a trained medical professional at the hospital in Charlotte?

A Yes, sir.

Q Okay.

A I would assume that.

Q You have not told us that when you sent the blood to the FBI, that 6.3.1 was truly sent?

A That's correct.

Q And it was just a mislabel?

A Yes, sir.

Q Okay. So then you had – or SLED had in their position – in their possession 5.4.2?

A Yes, sir.

* * *

[3370] I realized that I made that error. And one month later – one months and two days later I wrote Captain Mobley another letter. And I state "the letter accompanying the initial report from the FBI indicated an inclusion of certain biological evidence was the suspect. The evidence used for comparison, however, was found to match the victim. Please note this change from the initial letter."

* * *

[3372] Q Now, I'm still kind of interested in 5.4.2. There was no serological testing done on 5.4.2, right?

A There – there is no item 5.4.2 on the serology report.

Q So we can assume there wasn't any testing done on it?

A Yes, sir.

Q Do you have 5.4.2?

A No, sir.

Q Well, you had it at one time, correct?

A Yes, sir, I did, but that was returned.

Q You returned it to?

A I returned all the evidence that I had to Susie Wilson.

Q Right.

A And the date of that was January 27th, 1994.

Q So even in preparation for this testing today, I mean, for this case, okay, for now, did they ever say hey, why don't we send 5.4.2 instead of the cutting from the nightgown?

A No, sir.

Q I mean, do you have any evidence that 5.4.2 has been destroyed?

A No, sir, I don't have anything on item 5.4.2, [3373] other than the return sheet showing that I returned the evidence on January 27th, 1994.

* * *

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF
COUNTY OF YORK	)	GENERAL SESSIONS
THE STATE	)	TRANSCRIPT OF RECORD
	)	90-GS-46-1196
-vs-	)	90-GS-46-1197
	)	90-GS-46-1198
BOBBY LEE HOLMES,	)	90-GS-46-1200
	)	MARCH 21, 2001
Defendant.	)	YORK, SOUTH CAROLINA

VOLUME X

BEFORE:

HONORABLE JOHN C. HAYES, III, JUDGE; and a Jury.

APPEARANCES:

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* * *

[State's Witness FBI Agent Lawrence Presley – Direct By Mr. Pope]

[3438] Q Also we had State's Exhibit 48, and I'm just going to go through these and ask you to look at them. State's Exhibit 48, which is Q-1, a white paper towel; State's Exhibit 49, which is Q-2, the Bugle Boy Jeans; State's Exhibit 50, which is Q-3, the blue and white shirt; and State's Exhibit 51, Q-4, the pink gown 1.2.

You received all of these, as far as the opportunity for your testing?

A Yes.

* * *

[3446] Q Again, has to Q-4, now, this is the sample that you received in August, I believe. Could you explain how that occurred, as far as receiving this sample?

A Yes, sir. One of the quality control measures that we actually used is at the beginning of the process, we used what's called a yield test gel, and it's the first really quality control measure that we used in our testing. And the purpose of that yield test gel was to determine if the DNA that we received at that point was of sufficient quality. And by that I mean was it in fairly good shape. Do you remember, I said DNA does degrade over time? There is no way to stop that degradation. Frankly, that's a reality of forensic samples. They do degrade over time. The question is does it degrade so far that I cannot no longer use it for to test and the sample.

Well, in this particular case we ran the test gel. The first test gel that we ran, I ran all the samples that you saw that were submitted on the test [3447] gel and we

found that K-1, the known blood sample from the victim in this case, was so degraded that we couldn't use it for further testing.

* * *

[State's Witness FBI Agent Frank Samuel Baechtel – Direct By Mr. Pope]

[3526] When I compare those types, the types are the same at all of those locations where I have a conclusive column. So my – I took – I have a sample K-4 was a representative of Mary Stewart – Q-4, I'm sorry.

Q You used Q-4 for your other comparison?

A Yes, as an alternate known.

Q In layman's terms, based on your professional opinion, K-1 and Q-4, are they from the same person?

A Well, they exhibit the same genetic characteristics, yes. I didn't carry out the calculation to determine if they meet our criteria for me to say they are exactly the same person, but my experience tells me they are.

Q Your results of using Q-4 and Q-1, could you tell us the results of that test?

[3527] A Yes, on Q-1, the DNA type from this particular item from that stain matches the types Q-4 of Mary Stewart.

Q Q-5, the underpants, could you explain what your results were there?

A Yes. The stain on these underpants was analyzed and it reveals a mixture of DNA, a mixer of DNA from a male and a female. And comparing that mixture with the

profiles of Mary Stewart and Bobby Holmes, indicates that those individuals are possible contributors of that – of the DNA in that mixed stain.

Q Can you explain the significance of that mixture and the match, what the numbers mean?

A As you may have already learned, once a match is declared, such as that, a second part of that is to give some quantitative evaluation of how often you would expect to find those DNA types in mixtures such as that. So I carried out what we call a mixture calculation, which I took into consideration the DNA types that were present, obviously from more than one person. I said it's a mixture. And I determined the probability of choosing someone at random, or someone's, obviously, since it's plural, more than one person, some individuals at random [3528] from the population who could have contributed DNA to that mixed stain.

Q And is that what the 1 in 72 million, is that –

A Yes.

Q That would be the probability?

A That particular number, 1 in 72 million, is that calculation for individuals from the African American – with an African American background.

Q As part of your protocol, do you actually do calculations for caucasian?

A I do, caucasians and two – a hispanic population.

Q So the odds of finding another set of contributors or number of contributors is 1 in 72 million. What does the 99.99999 percent mean? Can you explain that to the jury?

A Essentially what it means is 99.99999 percent of the population is excluded as to the possible contribute to that stain. And that's derived by taking the – actually the probability value. This number here is actually the actual probability divided into one, so I could say it's one in so many. But the actual probability number is subtracted from one and then multiplied by a hundred to get a probability of the exclusion value of [3529] 99.999.

Q So the percentage number is the number of people that would be excluded as being the donor to that?

A Potential donors, yes.

Q Could you explain to the jury the results that you found on Q-3?

A Yes, that's also a mixture of DNA. And neither the contributor of this sample, which we are discussing as Mary Stewart, nor K-2, Mr. Holmes, can be excluded from the mixture of DNA found on this particular item.

Q Q-6?

A Once again, this is a mixture of DNA from which neither Mr. Holmes nor Ms. Stewart could be excluded, meaning I saw no DNA types that would enable me to exclude those two individuals as possible contributors.

Q Were all of their DNA types accounted for in those mixtures?

A The mixtures of DNA that I have talked about can be accounted for. All the DNA types that were shown can be accounted for by both Ms. Stewart and Mr. Holmes.

Q You also indicated that you received K-3, a [3530] subsequent sample of Mr. Holmes blood?

A Yes, sir.

Q And you had the opportunity to compare that to K-2?

A Yes, sir.

Q What were the results of that comparison?

A They're the same profile at all the locations.

* * *

[FBI Agent Frank Samuel Baechtel –
Cross By Mr. MacDougall]

[3547] And if I could just finish out my hypothetical. As this inventory sheet is being prepared, presumably with the bags in place, and the officer preparing it and checking to make sure everything is there, no gloves, no hand washing, bag to bag to bag.

This creates, you would agree, an opportunity for the kind of contamination that the National Institute of Justice says shouldn't happen, the taking, the lifting of one very small, or perhaps, as you said, not visible with the naked eye, sample of DNA and transferring it from one to the other?

A The potential exists. Of course, I wasn't there, so I can't comment on whether anything happened, but sure.

Q I appreciate that, but your answer is potential for that kind of transfer is certainly there?

A Potential.

* * *

[3562] Q Has anyone at SLED, or anyone else, ever asked you, or, as far as you know, any of your colleagues to test the nightgown or any other samples for the presence of EDTA?

A No, never. I have never been asked to run that test.

Q And you haven't performed it on your own initiative?

A No, sir.

Q So sitting here today, whether there is EDTA present in any of those samples is unknown to us?

A Certainly unknown to me.

Q Right. And if it were present, that would be indicative of several things, one of which would be blood on that sample came from a tube that had EDTA in it?

A Possibly.

* * *

[State's Witness Dr. James Maynard –
Direct By Mr. Thompson]

[3614] A The reason she got the pneumonia was a severe brain injury, so the brain atrophied, the brain – the death of the cells in the brain, such that her body is not able to function and fight off the pneumonia. She would have been very, very improbable for her to get a staph pneumonia, unless she was debilitated, in a comatose condition, or in hospital or a health care facility.

* * *

[Dr. James Maynard – Cross By Mr. Nettles]

[3616] Q When you talked for a second about the sterile tubes that you put his blood in, how did you –

Let me put it to you this way. You checked the expiration date?

A Yes, sir, I did.

Q And that's how you determined that the vial was sterile?

A You would look for the expiration date. You would look in the tube to make sure that there is nothing discolored in there. Some tubes have a liquid or a fluid in there. Some do not.

Q Okay. But, I mean, so that's the two things [3617] that you would do to make sure that you had a sterile tube, right?

A Yes, sir.

Q One, look at the expiration date. And if it expires, you wouldn't have used it?

A You would – I would not use it, no.

* * *

[In Camera Hearing On Third-Party Guilt Evidence After Close Of State's Evidence]

[3642] THE COURT: How do you – this is not – he is available. He doesn't fall under (L)(4), because that deals with unavailable witnesses.

Now, I know Cooper dealt with mainly 104, but if footnote 4 they talk about 801. No, I got the wrong case.

In any event, the concern I have with 8 – I have taken so many notes I can't even find it.

[3643] 801(d)(1)(a), which is what I understand, that appears to be the situation that Judge Pleicones addressed in Cooper dealing with Gilmore's testimony overheard at a restaurant. And, for lack of a better way to say it, that's sort of the strawman approach; that is, you put – you put somebody up simply to knock them down, and I don't think that you can do that. How do you ever – how do you get the testimony in, I guess is what I'm saying? It doesn't come in under 804, because he's available. He's testified before. He was here last week and said he would be back.

MR. KRELL: Right.

THE COURT: So you have to go and say – it's in the definition of hearsay. It's not hearsay. So, therefore, he would have to be testifying at trial, subject to cross examination concerning the statement. So how do you get there?

MR. KRELL: Well, Your Honor, back in August, on August 14th, when we had our initial, for a better term, a third-party guilt hearing, on August 14th, 2000, and I can provide a copy of the transcript. I would have to make copies, Your Honor.

Mr. MacDougall was questioning Jimmy White at [3644] that hearing. And one of the questions Mr. MacDougall asked was, "So, you don't remember anything – I'm sorry, I'm quoting from page 302 of the transcript, Line 23 and 24.

Mr. MacDougall asked Mr. White, "So you don't remember what you did that night?

"A. The only thing I know, I left – I went to the Shack and I caught a ride from Clyde's, from the Shack and went to Clyde's. And then the only thing I know, it was a fight

over there. And they said the police was going to come, so all of us left and went back home. And I was at home asleep."

Now, earlier we had a discussion where, over the defense's objection, the State moved into evidence Bobby Lee Holmes' statement when the police walked into his room and said "there is blood on your clothes." And we just moved in the statement where Bobby Lee Holmes said "I got in a fight at Clyde's." We intend to put up, if allowed, Your Honor, Jimmy White to corroborate why Bobby Lee Holmes might have had blood on his clothes from a fight at Clyde's, Your Honor. It's the defense's timeline of events as to what happened, Your Honor. And for that reason, Jimmy White is plainly a relevant witness, unlike Gilmore in Cooper.

[3645] THE COURT: As to that issue.

MR. KRELL: As to that issue, that's correct, Your Honor.

And once we have a relevant purpose for putting up a witness, Your Honor, which we do, as to that issue, Rule 607 says – I'm sorry, Rule 607 says that –

THE COURT: You can attack the credibility of any witness, whether you put them up or not. But that's – you can't – you can't create – I mean, you have got to get there. You're jumping that first thing. It's got to be something to impeach.

MR. KRELL: Okay, Your Honor. Well, we would –

THE COURT: You are not going to impeach him on the Clyde's testimony. I mean, you could. If he comes in now and says he wasn't, you could impeach him on that.

But you can't – as I call it, the strawman. You can't sit him up to knock him down. You can't put him up – he's not hostile. I mean, it's not where you are asking the court to declare him a hostile witness because he doesn't fall under that category. Not an adverse party.

So, I can't figure out any way, and again, y'all are smarter than I am, but I have gone over these rules,

* * *

[3655] And finally, Your Honor, just in case it becomes an issue in your mind, the reason that there was no forensic evidence linking Jimmy White to the scene of the crime is because they did not test his hair against the blue tank top that was by the dog. They did not test his shoes against the shoe print, the mystery shoe print that we learned about earlier, and they did not test his clothes. And it's important to remember, Your Honor, they did test Bobby Lee Holmes' clothes. They did not test Jimmy White's clothes. Thank you.

THE COURT: As I said, this is a very difficult decision. I'm going to disallow the testimony. I do not believe under Rule 804(b)(3) or 801(d)(1)(a) that it can come in under either of those rules. And like in Cooper and the other cases, in Gregory, we sort of dance around these Gregory standard and other things, but in Cooper, which was a 1999 case, there is a statement dealing with the individual who wanted to testify about overhearing the statement, and I know it was only one, "but aside from Nelson's assertion there was no credible evidence linking Gilmore to the victim's murder." So I know when we [3656] talk about the trustworthiness of the statements, that's one issue, but here there is no evidence that is to clearly

point out that Mr. White was guilty of the crime. And that under the two rules that it can't come in evidentiary-wise, but also substantive-wise as to third-party guilt.

MR. KRELL: Your Honor, I just want to make sure that the record is straight. Your holding is that Rule 804 and 801 are essentially trumping the Constitutional Rights of Bobby Lee Holmes, is that right, under Chambers v. Mississippi?

THE COURT: Well, I'm just saying those are the rules and our court has interpreted them, and particularly that they are the Rules of Evidence. I'm not going to say they are trumping anything. I'm just making a ruling.

* * *

[Defense Witness Bobby Lee Holmes, Jr. – Direct By Mr. Nettles]

[3661] MR. NETTLES: To provide sworn testimony from the defense, the defense calls Mr. Bobby Lee Holmes to the stand.

BOBBY LEE HOLMES, JR., having been first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. NETTLES:

Hello, Bobby.

A How are you doing?

Q Did you rape and beat Ms. Stewart?

A No, I did not.

Q Were you in the apartment complex on California Street the night that she was beaten?

A No, I wasn't.

Q How did your blood – how did her blood get on your shirt?

A I don't know.

Q How about your fingerprint, Bobby? You have [3662] heard they say your fingerprint is on the inside of her apartment. How did that happen, Bobby?

A I don't know how that happened.

Q How about the fibers, Bobby, how did that happen?

A I don't know.

Q Tell the jury what your name is.

A Bobby Lee Holmes, Jr..

Q Where were you born?

A York, South Carolina.

Q Bobby, do you have a criminal record?

A Yes.

Q Share it with us.

A I had caught a charge while I was in the SCDC waiting on this trial for throwing bodily fluids on a C.O..

Q And that's – caught a charge, that means you pled guilty?

A Yes, sir.

Q Did you go to a club the night of 12 – of December 31st of 1989?

A Yes, sir.

Q. What's the name of that club?

A Clyde's.

Q Who did you go with?

[3663] A I went with Terrence Digsby, Bobby Hemphill, Bobby Crockett, and another dude. I don't know his name though.

Q How long did you stay there?

A Basically until it closed.

Q After it closed – well, let me ask you this. While you were there, did you drink anything?

A I had a little to drink.

Q Did you get drunk?

A Not drunk, but I had a little to drink.

Q Would it be safe to say that you were not sober?

A Yeah.

Q Were you using any drugs?

A No.

Q Where did you go from Clyde's?

A When we left Clyde's and stuff, I had went to Townhouse Apartments, to my cousin Tonya Jamison's house.

Q How long did you stay there?

A We stayed there – we stayed there – we was just talking and stuff. We stayed there for a little bit. I'm not sure about the time, though.

Q Did you have a watch?

A No.

[3664] Q Where did you go next after you left Tonya Jamison's?

A After we left Tonya Jamison's house, I went over to Cannon Court where my sister stayed at.

Q What's her name?

A Tina McCombs.

Q And at Cannon Courts, your sister's house, did there come a time that maybe some people got a little too loud?

A Yes, sir.

Q Were you one of those – were you in that group of people that got a little too loud?

A Yes, sir.

Q Were you one of the people that got too loud?

A Yes, sir.

Q. What happened? Did something – you know, did a time come that you – the police came because y'all were a little too loud?

A Yes, sir.

Q. Who came?

A An officer, Sergeant Grady Harper, I think.

Q. The man who testified in here at the beginning of your trial?

A Yes, sir.

Q And when he came, did he tell you all to leave?

[3665] A Well, he came and he was talking to us, and, you know, basically said we had to leave and stuff, yes.

Q Okay. Did you leave?

A Not –

Q Right away?

A Not at the time, no, sir.

Q Was there an event that ultimately caused you to leave?

A Well, I ran, you know.

Q But did more police officers come?

A Yes, he had called for backup and stuff, yes, sir.

Q. Whenever you heard that, what did you do?

A Well, that's when I ran.

Q. Why?

A I did not really want to go to jail.

Q. Where did you run to when you ran from Mr. Grady Harper the first time?

A Well, I ran around the apartment building. I jumped over a – it's like a brick wall in the apartment complex, and I went over like – I was still in the apartment complex, but it was like I went around another building and I basically was hiding behind that building.

* * *

[3666] Q Bobby, I'm showing you something that was earlier marked Defense Exhibit 35, okay?

A Uh-huh.

Q Is that the wall that you jumped?

A Yes.

Q And when you jumped that wall, where did you wind up?

A On the other side of it. I just went like around the building and stopped.

Q On the other side of wall, did you wind up in some peoples back yard?

A No, I was still in the apartment complex.

Q Okay.

A Like I say, I just ran to like to the other side of – across the street from the apartment complex.

Q Now, what did you do there?

A Well, once I realized that they wasn't chasing me, I just stood there. I could see them from where I was. I just sat there and watched them. When I seen them leave, I went back over there.

[3667] Q When you went back over there, did you bump back into a friend of yours?

A Yes, sir, I ran back into Terrence Digsby.

Q Terrence Digsby. When you saw Terrence Digsby, what did you do?

A Well, I was on my way back over the wall and – I was sitting on top of the wall and he pulled out and I flagged him down and he stopped.

Q What did you do then?

A He got out and he just told me to get in the back seat, so I jumped in the back seat.

Q Did you sit up in the back seat?

A No, I laid down in the back seat.

Q Did the – what happened? Did y'all – I mean, I guess y'all pulled off then, right?

A Yes.

Q What was sort of the next big thing that happened in your adventure?

A Once we got like to the top of the street coming into Cannon Court, Terrence just went – he like went left.

Q Okay. And what happened? Did he get to make that left turn?

A He made the left turned, but he said he seen the police, so that's why he made the left turn [3668] instead of going right, and that's when a car got behind us, and he kept telling me to lay down, lay down, there's the police.

Q Did you lay down, lay down?

A No, I looked up.

Q When you looked up, what happened?

A That's when the blue lights came on.

Q When the blue lights came on and what happened after that?

A Terrence – we had done went down the street a little bit and we turned beside this big church.

Q Okay. And what happened then?

A I jumped – I jumped out the back seat and ran.

Q And why did you run?

A Because the police.

Q And did Terrence run?

A I'm not sure. I was gone.

Q Where did you go to then? Is this the – hang on for just a second.

I'm showing you what's been marked as Defense Exhibit 32. Is this the church?

A Yes.

Q This is the church that you – where they stopped and you jumped and ran out?

A Yes, sir.

[3669] Q Okay. And how far is that from where your sister lives?

A It's not that far.

Q I mean, you hadn't gotten very far, had you?

A No, we hadn't gotten very far.

Q So you ran. And where did you go then?

A I ran around the church, and basically just like once I came back around the other side of the church, it's like some houses. I ran across the street behind the houses into the woods.

Q Okay. And then once you got in the woods, what did you do?

A Basically I had fell down, so I just laid there because I could hear the police.

Q Did you have to run through any bushes and briars?

A Yes.

Q Did you get cut up at all?

A I got scratched up pretty good.

Q When you fell, did you get hurt?

A I hurt my arm, yes.

Q Show us where you hurt yourself. Do you still have the scar?

A Yes, I have got a scar.

Q Okay.

[3670] A It had like – it had nicked myself.

Q Right there. Was it bleeding?

A Yes.

Q So you – how long did you – you fell or you laid in the woods?

A Yes.

Q How long did you lay there, do you know?

A Well, I don't know. Like I said, I never had no watch on, so I don't know exactly what time it was, but I had seen like another police car come.

Q Come to where?

A Come down there to the scene where –

Q The church was?

A Yes.

Q Okay.

A And I seen them riding up and down the street like flashing big lights behind the houses and stuff.

Q Right.

A And next thing I know, I seen like some yellow lights flashing, and that's when I realized it was a wrecker coming.

Q A wrecker coming to where?

A To tow the car in.

Q Okay. And that would have been whose car?

[3671] A Terrence Digsby's car.

Q So whenever you saw the wrecker came and towed Terrence Digsby's car away, what did you do then?

A I was still laying back, sitting back there in the woods now. And when I seen the wrecker tow the car away, I was – I still see Grady Harper's car. He had like lights on in the inside like he was doing a report or something.

Q Right.

A And I seen him turn the lights off. I seen him leave. And I came out – came out of the woods.

Q Where did you go then?

A I was on my way, like coming out going back to Cannon Court.

Q And who lived at Cannon Court?

A My sister.

Q Is that where all this disturbance thing started?

A Yes.

Q Okay. You went to Cannon Court, and did you – whose house were you trying to go to in Cannon Court?

A My sister Tina.

Q And why did you want to go in there?

A Basically I wanted to go get out – you know, I [3672] was stranded, so I just wanted to go there and lay down and go to sleep.

Q Were you also trying to get some help for your cut?

A Yes.

Q What else did you want?

A I had asked for some water.

Q Did she let you in?

A No, she said the police had said they was going to come back and check and if I was there, she was going to be locked up too, so she – she was afraid to let me in.

Q Now, so she wouldn't let you in. Where were you headed now?

A Basically my next option was to go to my father's house.

Q And where does your father live?

A He stays in the valley.

Q In the valley. Now, that's a road, right?

A Yes.

Q Valley Road?

A Yes.

Q I'm showing you what's been marked Defense Exhibit 26. Is that your father's house?

A Yes.

[3673] Q That's your father's house on Valley Road?

A Yes.

Q Okay. Did you get there?

A Well, as I had –

Q Did you ultimately get there?

A Yes.

Q Is this where you were arrested?

A Yes.

Q Now, so you left your sister's house going to your daddy's house on Valley Road?

A Yes, I was on my way out and that's when I had ran into the police car again.

Q Okay. You ran into a police car again?

A Yes.

Q What happened then?

A Basically I just flagged them down and they got out and they was talking to me. I said I was sorry, I didn't want to –

Q Was Terrence Digsby there?

A He was in the back seat.

Q The back seat of the police car?

A Yes.

Q He was already under arrest?

A I reckon. He was in the back seat of the police car.

[3674] Q Okay. And so what did you tell the police then?

A I was just telling them – they were talking to me to come and let's talk. I said I don't want to talk. I don't want to go to jail. You know, I apologize for the argument I

had got in with the other officer, but I didn't want to go to jail, and that's when they like tried to come at me and I just ran again.

Q Okay. And where did you run to?

A I went like – I was down by that church again. I was on the same side of the church. It was like a little pass. I just ran up through that pass.

Q And where did that put you out at?

A That put me out like the street over.

Q Okay.

A And I had – I had came to this like trailer.

Q Who lived there?

A I don't know. I done forgot it. I don't know her name.

Q Does Ms. Talbert live there?

A Yes.

MR. POPE: Your Honor, I'm going to object to the leading. I have tried to –

THE COURT: Rephrase your questions.

[3675] BY MR. NETTLES:

Q Who lives there?

A Ms. Talbert.

Q When you got to Ms. Talbert's house, what did you do?

A I knocked on the door and she came to the door and –

Q What did you ask for?

A Some water.

Q Did you get any?

A Yes.

Q And how long did you stay there?

A Basically I just stayed there long enough to try to let the police scan the area and to move on. That's all.

Q And did you leave there?

A Yes.

Q Where did you go from there?

A I left there and I had like went to the top of the street she stayed on. It's like a car wash and washerette.

Q Right.

A And I had like walked around back into the car wash part, and I – like I say, I don't know the name of the street it's on, and I basically had went [3676] straight down that street.

Q Straight down that street to where?

A Like I said, straight all the way down and I came out to like a – it's a dirt road.

Q Okay.

A And it's like a railroad track, and I basically got on the railroad track and I came out beside like – it's a video store.

Q Okay.

A And it's another washerette. I went behind there and I walked right through by the police station.

Q And then when you walked through the police station and you went by there and then where did you go from there?

A Once I walked through the back of there, I ran across the street and came out in the back lot.

Q In the back lot?

A Yeah, once you like cross the street of the police going –

Q Is that where city hall is?

A Well, it's city hall there, I reckon. That's that police station. I'm not sure.

Q Okay.

A But I just went on and walked across the street [3677] from there and ran across the street.

Q Did you ultimately wind up on what's called main street?

A That's what I call the main street.

Q What's the real name for that, do you know?

A I think it's Congress Street, but I – I just say it's the main street, because it leads through town.

Q When you got to the main street, did you turn right or left?

A Left.

Q And you turned left and you went down main street?

A Down main street.

Q Or Congress Street?

A Congress Street, yes.

Q At some point did you pass California Street on your right?

A I had to pass it to go to the valley. That's the direction that I'm going in.

Q When you got to the corner of Congress Street and California Street, did you turn right and go down California Street?

A No, I kept running straight, going straight to the valley.

[3678] Q And when you got to the valley, what did you do?

A I went to bed.

Q Well, how far is it from downtown to the valley?

A I really don't know.

Q Do you know how long it took you to get there?

A Well, actually I was dipping and dodging. So, you know, if I see a light come along, I just jump out of the

way, so I really can't say. I don't know. I didn't have a watch on.

Q Did you ever go by a place called Williams Liquor Store?

A Yes, I went past that and crossed the railroad tracks and through the pass and came out on Valley Road, yes.

Q And then were you ultimately arrested?

A The next day.

Q The next day.

A Yes.

Q Once you got to that house, did you ever leave there?

A No.

Q Did you receive any phone calls when you got home?

[3679] A My sister Tina had called me, but she was making sure I was alright and stuff.

Q Is that the same Tina that had been at the house where the disturbance was?

A Yes.

Q I'm going to ask you one last time, Bobby. Did you do this crime that you are charged with?

A No, I did not.

Q Thank you.

THE COURT: Please answer any questions the State has.

MR. POPE: Beg the court's indulgence.

(off the record)

(back on the record)

CROSS EXAMINATION BY MR. POPE:

Q Mr. Holmes, Mr. Nettles was asking you about the valley?

A Yes.

Q That's a road, but that's – that's what they call a community down there too, is that right?

A Yes.

Q I want to go back through. I was trying to take notes as I went through. If I say something different than what you said, you stop me and correct me, okay?

[3680] A Okay.

Q You're at your sister's house on Cannon Court?

A Yes.

Q Is it Tina McCombs or –

A Tina McCombs.

Q And you got into an argument with her?

A Brother-sister argument, yes.

Q It was enough that the police came down there, right?

A Well, me and her wasn't arguing when the police had got there. It was like me and Bobby Hemphill was just horseplaying around. Well, I was horseplaying around and he wasn't.

Q Was he mad?

A Yes, he was mad.

Q Were you winning?

A Not necessarily I was winning. I was just – you know, I was just horseplaying with him.

Q What do you mean by horseplay?

A Boxing, you know. We was just wrestling and stuff.

Q And then the police came down there?

A Yes.

Q And you talked to the police. Do you think it was Grady Harper?

[3681] A Yes, that's who it was.

Q Now, you said that – and then he was going to put you under arrest, wasn't he?

A First when he came down, they had asked us to leave, and me and him got into an argument. And the next think I know, he called backup. They was going to arrest me.

Q You told him he wasn't big enough to put you in jail, didn't you?

A I don't remember what I said, but –

Q Something to that effect?

A I don't remember what I said.

Q And you ran from down there because you were afraid they were going to put you in jail, right?

A Yes.

Q Okay. You jumped the fence behind the apartments and ran back behind the other apartments, is that right?

A Yes.

Q Then you kind of – you kind of loop around, right? Then you came back out and that's when you saw Terrence and flagged him down?

A Yes.

Q And then when y'all turned out to the left, that's when the police got behind you?

[3682] A Yes.

Q And when you got down to the big church, that's when Terrence pulled over and you jumped out and ran again, right?

A Yes, sir.

Q You ran around a church and into the woods there?

A Yes.

Q You stayed back there until the police left?

A Yes, after I seen him, that's when he left.

Q And you saw them tow the car away and everything, is that right?

A Yes, I seen all that.

Q And once the car was towed away and everybody was gone, then you came back out, is that right?

A Well, I seen – first, like I said, I seen like Grady Harper had his light on and he was doing a report or something. He cut the light off and pulled off, then I came out.

Q And when you came out, that's when you talked about that you apologized to the officers?

A No, I had went back to Cannon Court. I had done came away from Cannon Court before I ran into them again.

Q So you went back to Cannon Court twice now?

[3683] A I had went back to my sister's house, yes.

Q And it was that time that she wouldn't let you in?

A Yes.

Q And once she wouldn't let you in, what did you do?

A Like I said, once I couldn't get in, so it was my decision to go to my father's house.

Q And that was down in the valley, right?

A Yes.

Q You went the back streets until you got into the back lot?

A Basically, yes.

Q Now, the back lot, that's kind of like all that parking lot stuff that's behind the buildings on that side of Congress Street? Is that what you call the back lot?

A Well, that's what I have been calling it since – that's the only name I had knowed it by.

Q Kind of a big different parking lot, you got some buildings here and there, and it's the back of the other buildings, is that right?

A Yes.

Q And let me just make sure I have got it right. "I left down from there and I was going to the [3684] valley. I went to the back streets until I got to the back lot." Is that right?

A Yes.

Q "I went through an alley and came out on main street."

A Yes.

Q "I then went straight up main street until I got to the corner where Williams old liquor store is."

A Yes.

Q "I then went down a path over to Valley Road." That's the one that comes out in front of Galilee Church, right?

A Yes.

Q "I then went to my father's house at 124 Valley Road," is that right?

A Yes.

Q Okay. "I got home about 5:00 or 5:30 in the morning." Is that right?

A I don't – I'm not sure about the time. It was – if – I'm not sure about the time.

Q Let me ask you this. When you got home, was it still dark?

A It was coming light.

Q But you were able to still see – you were [3685] talking ducking and dodging from cars. You were still able to see headlights and stuff, so it wasn't light yet?

A Yes, I could still see car lights and stuff like that, yes.

Q It's really – by then it's kind of heading toward morning, but you would agree with me it's still in the nighttime at that point, right?

A Yes.

Q And I think your testimony, you didn't go down California Street, and you hadn't been there in over a week, is that right?

A Yes.

Q And you had been on California extension, but that's all the way down there where Clyde's is at?

A Exactly.

Q And you did not know Mary Stewart?

A No, I did not.

Q Okay. And you don't know where she lived?

A No, I did not.

Q You had never been to her house?

A No, I did not.

Q And you have never been in her house?

A Exactly.

Q And when you walked home, you were by yourself [3686] and nobody was with you?

A (shaking head yes)

Q Is that right?

A Yes.

MR. POPE: Beg the court's indulgence.

(off the record)

(back on the record)

BY MR. POPE:

Q Mr. Holmes, I will have you look at State's Exhibit No. 28. Do you remember when you gave that to Bruce Bryant?

A Yes.

Q Okay. And is that accurate, as far as what you did and what happened that night?

A Yes.

Q Okay. Thank you, sir.

A All right.

Q As a matter of fact, you talked to them the day that you were arrested and gave them a statement the next day too, right?

A I don't remember talking to them the day before. I don't remember that.

Q You don't remember talking to Bill Mobley and Boot Smith and they recorded it and you are talking about basically the same stuff and they were asking [3687] you –

A I don't – I don't remember that.

Q You don't remember talking to them?

A No.

Q You're not denying that? You just don't remember?

A No, I'm just saying I don't remember. I'm not denying it. I just don't remember.

Q Now, that night when you left there – I mean, when you were out that night, you had on your black hooded jacket, is that right?

A Yes.

Q Had on your stone washed jeans? We seen those, right?

A Bugle Boy.

Q You had your underwear on that you had on when they come and wake you up the next day, is that right?

A Yes.

Q Had on that kind of a tank top kind of muscle shirt or something that's –

A I did not have that on.

Q You didn't have that on then?

A No.

Q So you were just wearing your sweat shirt?

[3688] A Yes.

Q But the blue and white shirt that they got there, that's your shirt?

A Yes.

MR. POPE: Beg the court's indulgence.

(off the record)

(back on the record)

BY MR. POPE:

Q Mr. Holmes, basically once you ran from the police, in your words, you were dipping and dodging, trying to avoid being seen, right?

A Yes.

Q You went to your sister's house and knocked on her door trying to go in there to find a place to be, right?

A Yes.

Q When you left there, you went – and you didn't say this in this statement, but you said a minute ago you went to some lady's house and knocked on the door?

A Yes.

Q Okay. And you didn't tell the police that back then, did you?

A Well, at the time, he basically – when they had locked me up, they hadn't locked me up for no [3689] murder. They came and locked me up for a fight. So all I was thinking about was a fight. That's all I knowed about was the fight.

Q Okay. So when they had locked you up –

A They came –

Q – you told them – you told them – they asked, said where had you been, you told them exactly where you had been, but suddenly now that it's a murder, you are telling me about this lady?

Q Okay. And you didn't tell the police that back then, did you?

A Well, at the time, he basically – when they had locked me up, they hadn't locked me up for no [3689] murder. They came and locked me up for a fight. So all I was thinking about was a fight. That's all I knowed about was the fight.

Q Okay. So when they had locked you up –

A They came –

Q – you told them – you told them – they asked, said where had you been, you told them exactly where you had been, but suddenly now that it's a murder, you are telling me about this lady?

A I'm saying then the question was asked. At the end of the statement it was asked do you know Mary Stewart. I said no.

Q Oh, I'm sorry. I didn't mean to confuse you. I was talking about the other lady Mr. Nettles –

A I know who you were talking about, but I'm saying at the time it wasn't important to me, because when they came and talked to me, said they wanted to take me down to the station to talk to me, it was about a fight. It wasn't about no auto theft. It was about a fight. I'm going to ask you questions about a fight last night.

Q They actually had arrest warrants for you for an auto theft, didn't they?

A I didn't see no warrants.

Q Didn't they serve them you on down there?

[3690] A They didn't serve no warrant. When they came to me at my house, it was about a fight.

Q Well, when they came to your house, the truth of the matter is you were – they were talking to you about the warrants, because you were saying who you were going to get for ratting you out.

A It was about a fight. That's what it was about, a fight.

Q That's what you –

A It wasn't about no car theft. It was about a fight.

Q Okay. And you were angry at the time that they were there about that fight?

A I'm saying, when they came – when they came to me, I'm saying when they said we want to talk to you about a fight, I'm saying how did I get involved with a fight.

Q Okay.

A And that's what they was talking about, a fight.

Q And they talked to you about a fight?

A Exactly.

Q And at that point you told them about the blood on your shirt?

A I didn't tell them about nothing, because they [3691] took me away from the house. I was at the police station about an hour. They stayed there at the house and took things out of the house.

Q Okay. What about the fight at Clyde's? Did you tell them about the fight at Clyde's?

A No, they came and asked me about a fight at Clyde's.

Q Did you tell them about the blood on your shirt coming from Clyde's?

A I didn't tell them about nothing. I was at the police station. Bill Mobley and Boot Smith stayed down at my dad's house and they took all that stuff out. I was at the police station. I was down there for about an hour before they even came down there and talked to me.

Q Now, the only thing they got out of your house was your blue shirt and that other black sweat shirt that doesn't have the hood on it, is that right?

A That wasn't – that wasn't even my sweat shirt.

Q That's not your sweat shirt?

A No.

Q The one that doesn't have the hood is not yours?

A That was my father's sweat shirt. That's his work sweat shirt.

[3692] Q So yours is the one that you had on?

A That's right, exactly.

Q So basically the stuff you had on – your underwear, your pants, all that stuff – was yours, and you took that to jail with you because you wore it, right?

A Yes.

Q Okay. And so the thing they recovered that was yours at the house was the blue and white shirt at the foot of your bed, right?

A I don't – like I said, I don't even – I didn't know what they got out of the house.

Q I'm saying that's your shirt? You have seen the shirt.

A That was my sweat shirt – that was my tank top.

Q Kind of a slick tank top, right?

A Yes.

Q I want to go back to this lady. Tell me about the lady that you knocked on the door and got the water.

A I don't – like I say, I don't know her name, but I had been there to her house before.

Q Where does she stay?

A She stay like – it's hard for me to describe. [3693] Just – it's over there by the Cannon Court area.

Q How did you decide to knock on her door in the middle of the night?

A Because when I seen the light on in the trailer. When I was coming through the path, I seen the light on?

Q You went to that door?

A Yes.

Q Was that after you had left your sister's house?

A Yes.

Q So you went to your sister's house and she wouldn't let you in. And then you went to this lady's house and knocked on her door and what happened?

A She let me in.

Q She let you in?

A Yes.

Q Did you see her husband there too?

A I seen where – I would say he was in bed, but she had known me, because I had been there with my cousin before.

Q Right.

A And she was asking me what I was doing out that night. And like I said, I was like, you know, I had [3694] been in a fight, you know, I was just like trying to kill some time.

Q Okay. But you wasn't trying to kill some time. You was trying to duck and dodge and get to the valley, right?

A Well, once – like I said, I had just left the police. The police was –

Q So it was good thing to get in the door somewhere else, right?

A No, I'm not saying it was a good thing. I'm saying when the police had left from over there on the other street, I figured they was coming around there. Since I knowed her, I figured I would go in there. And if they come, they would just scan through, and when they see I wasn't out there, they would move on. That's enough time for me to get me some water and move on and catch my breath.

Q Did you go to get water or did you go to hide?

A Well, I got water and caught my breath.

Q And when you went in her house, you said her husband was laying there in the bed?

A I don't know. He was in the room. I don't know if he was her husband or not.

Q Yeah, there was a man there?

A Yes.

[3695] Q Okay. And either laying on the couch, or laying on the bed, or something?

A He was in the bedroom.

Q Okay. He was in the bathroom?

A Bedroom.

Q Bedroom. I mean, you could see him, is what I'm getting at. It's a trailer?

A I had hollered at him and spoke to him on the way out of the door.

MR. POPE: Beg the court's indulgence.

(off the record.

(back on the record)

BY MR. POPE:

Q All right. Mr. Holmes, so you left there – and, again, you didn't – I apologize. I'm getting confused.

You didn't tell the police about going to her house, but you left her house and basically then you are back on track with this statement, right, about cutting up and cutting through the back lot and going up?

A Yes.

Q So you're not denying when you went home, that you came right up there at the top of the California Street at that time?

[3696] A That's the way I had to go to get to the valley.

Q Now, when you went by there, a minute ago you said that you didn't know what time, but you told the police about 5:00 or 5:30, is that right?

A I didn't tell them. They – they made that suggestion you think it was this time. I said basically.

Q I got you. So they put the 5:00 or 5:30. You really don't know what time it was?

A I don't know what time it was.

Q Now, I think you said this was the statement. I want to ask you one thing. Down there – you see up at the top when the times – where you got the statement and where it says the times, like – what is it, like 1:10, or something like that? You see up at the top?

A Yeah.

Q That's – that's – that's right, they talked to you like right after lunch?

A I'm not – I thought it was later than that.

Q Later in the day?

A Yeah.

Q And then it was after that that they served these warrants on you for all this stuff with Mary [3697] Stewart, is that right?

A I don't know. The only thing I remember, that's when I received the grand larceny auto theft warrant.

Q Do you remember that day on January 1st, that you – as a matter of fact, Bruce Bryant was the one that served the warrant on you, wasn't he?

A I don't know. I don't remember who all.

Q But you remember it was that afternoon after you talked to them? They didn't put you under arrest for this and then go start talking to you, did they?

A I'm saying I don't remember being served all like I had when I was in the county jail all them years, all they had on the computer was grand larceny auto theft. That's all they had in my file and everything, grand larceny auto theft.

Q At the county jail?

A Yes.

Q But you are aware that you were arrested on warrants at that time, that afternoon?

A Well, I am now.

Q Okay. Certainly today, but back then you were that afternoon, right?

A No, basically that afternoon I didn't really [3698] know I was charged for Ms. Stewart's stuff until they had moved me to the county jail and the dude asked me what my name was. When I told him, he handed me the newspaper and said you made the front page. And that's when I had realized. That's when I decided to call my mom.

Q I got you.

Mr. Holmes, again I have been confusing the issue a little bit. On the 31st, that day when they have came and picked you up down at the valley?

A Yes.

Q On that day they served warrants on you for grand larceny auto, right? Two warrants, right?

If you need – would it help you to look at them?

A I'm saying – you are saying they served. I don't remember no warrants being served. The only thing I remember they coming and asked me about a fight.

Q Okay.

A That's what I went to the police station on about a fight at Clyde's the night before.

Q I understand that. And I'm saying once you got to the police station – are you with me there?

A Yes.

[3699] Q Dale Edwards come and rode you to the police station, right?

A Yes.

Q Okay. And once Dale Edwards took you to the police station, they served the warrants for the grand larcenies on you there, is that right? Do you see on the top left-hand corner where it says served on Bobby Holmes this day and it's got a signature?

A Yes.

Q Who served those warrants?

A I think Martin, but I'm not sure.

Q And then after that, on the next day, after you talked to Sheriff Bryant – after you talked to Sheriff Bryant, then they served them warrants on you for the robbery and the sexual conduct and the burglary, is that right? Again, would it help you – do you see up in the left-hand corner where it's got Bruce Bryant?

A I see the name, but I don't know – remember who served them on me.

Q And you don't remember who served them?

A No.

Q It could have been Bruce Bryant? You just don't remember who served them on you that day?

A It's been almost twelve years ago. My mind has [3700] done been through a lot now.

Q But you remembered the lady and drinking the water now that you didn't remember back then, right?

A I'm saying –

MR. NETTLES: Objection, Your Honor. First of all, that mischaracterizes what he said.

THE COURT: Please rephrase your question.

MR. NETTLES: I'm going to ask that that question be struck.

THE COURT: All right. Just disregard that question. I don't believe there was an answer, but just let's go on.

MR. POPE: This is cross examination, Your Honor.

THE COURT: I understand that, but let's – he says you mischaracterized it.

MR. NETTLES: Your Honor.

THE COURT: Let's let the jury step out for just a minute.

MR. POPE: We will see.

(The following takes place outside the presence of the jury panel)

THE COURT: Before we do anything, read back the question.

(Whereupon, the requested testimony was reread [3701] by the court reporter)

THE COURT: I presume that you – you said it's a mischaracterization?

MR. NETTLES: Yes, sir. I mean –

THE COURT: Do you feel concerned it's argumentative?

MR. NETTLES: Well, it's argumentative and it mischaracterizes the evidence.

Mr. Holmes – I know Mr. Pope doesn't like the answer. I'm getting ready to have to object as asked and answered. Mr. Holmes said – he asked him did you –

MR. POPE: Your Honor – maybe this is one – I don't know how you accomplish this, but he can't coach a witness now.

THE COURT: Well, I'm not going to – let's just –

MR. NETTLES: He's asked – he's answered that question. Just let me put it that way. He answered it.

We can do this at the bench, Your Honor, if –

THE COURT: I want everything on the record.

MR. NETTLES: They asked him that question twice now. Okay. It's been made clear that because of the context that the question was placed, that he [3702] did not feel it was relevant and – I mean sufficently –

We can take Mr. Holmes in the back, if they would like, but, I mean, he's asked his question. It's been answered. And now he put in a question attempting to characterize, first of all, things that aren't in the facts, and secondly, to mischaracterize the small fact that is in the record. And that is the question of so do you remember the water lady – I mean, you don't remember the what time, but you don't remember – you didn't remember the water lady back then. That's not what he said. What he said was what he previously said. I want the record to be clear I'm being – I'm attempting to be mildly obtuse in attempt to not speak in front of my client.

THE COURT: Why can't we just move on? Isn't that the best way to do?

MR. POPE: Yes, sir. I just want to make sure I have a full opportunity. When we crossed the DNA people, we asked the same question fourteen times. I just want the opportunity for full cross. And I think I would be entitled to that, Your Honor.

The fact that Mr. Nettles characterizes something, that's a straightforward cross [3703] examination question. It's inconsistent between what he said the first time and the last time, and I'm – I'm able to point that out, Your Honor.

THE COURT: You are saying the last time. What do you mean by the last time?

MR. POPE: He gave a statement to law enforcement in which he did not say that. He has testified that he did say that. And I was simply pointing that out, Your Honor.

MR. NETTLES: The problem is he never said I don't remember going to the water lady. What he said was what he said.

THE COURT: Yeah, I understand.

You are saying not that he was asked – he obviously wasn't asked, because he gets water somewhere, but the fact that it's not in the statement.

MR. POPE: Is inconsistent with what he's saying today. He told me –

THE COURT: It's not inconsistent. It's just different, because he didn't say – I mean, he – there is nothing about the water lady, that I recall in the statement, is there?

MR. POPE: No, sir, there is not.

THE COURT: Okay.

[3704] MR. POPE: But they – he told them directly where he went. He didn't tell them anything about going to the water lady.

THE COURT: Well, we run into this all the time in criminal and civil trials about examination on the – on the stuff that's – that the statement is silent on. And you – you can't examine him in that fashion, in my opinion, well, you remember it now but you didn't remember it now. You are just saying you are testifying to that – the fact that it's not in the statement doesn't mean –

MR. POPE: Well, that's for Mr. Nettles to argue.

THE COURT: Well, is it so crucial that we can't move on to something else?

MR. POPE: It was obviously crucial enough to ours that they interjected it.

MR. NETTLES: I don't want to be disrespectful, Your Honor –

THE COURT: No, I understand. Well, I'm going to ask that that question and then you go onto something else.

MR. POPE: Your Honor, could I have a brief break –

THE COURT: All right.

[3705] MR. POPE: – before we start back?

MR. NETTLES: Your Honor, I vehemently disagree with that. I mean –

THE COURT: Well, is it –

MR. NETTLES: He wants to have a break, he's got his chance to do his cross examination. And he, you know, goes –

MR. POPE: Your Honor?

THE COURT: You need to use the facilities?

MR. POPE: I would just like a brief break, Your Honor. We have stopped at least three of the State's witnesses, I know of, for Mr. Nettles to stop and start. While we have got a jury out, it would be a good time. I

would like a break to maybe collect my thoughts and maybe do a quicker job.

MR. NETTLES: But –

MR. POPE: But he can object to that, but he's darn sure done it three times earlier, Your Honor.

MR. NETTLES: I never asked for it.

MR. POPE: Well, I mean, Your Honor –

MR. NETTLES: I never asked for it. And, I mean, the court asked for that at one point.

I am now being – I am now put in the position because he wants me to pay for objecting. And the penalty that I'm having to pay for objecting is [3706] sending the jury out so he can go collect his thoughts, a solicitor who is supposed to have tried umpteen hundred cases, and get prepared for something. He's the person that called this case in here today. And if he's not prepared to cross examine Mr. Holmes, it shouldn't come at the cost of me making an objection.

MR. POPE: Your Honor, no different than when I objected and I paid the cost, that I said let's finish the cross, and the court again let Mr. Nettles stop. And I think even we went into the next day and he finished on Captain Mobley, Your Honor. I'm just asking for equity. It can't be different –

THE COURT: Well, I'm going – we are going to. We will take a short break.

MR. POPE: Thank you, sir.

THE COURT: Mr. Holmes, you can step back into the holding cell.

Tell the jury that if they want to take a quick smoke break, this would be a smoke break.

(Proceedings recessed)

(Proceedings reconvened)

THE COURT: Yes, sir.

MR. NETTLES: Thank you Your Honor.

[3707] I would like just to place on the record that – no, I think I would just like to call attention to the record that every single step when I have asked for a continuance in this case, Mr. Pope's position has always been we're ready, we're ready, we're ready, we're ready, let's go, let's go, let's go, let's go. And I have had to fight tooth and nail to have the time to get ready, and I appreciate the court allowing me that.

He controls the docket by statute. This case has been pending for a long time. I find it fundamentally unfair that the solicitor takes the opportunity for when I make a valid objection and then ask for time to go cross examine a man who has had pending – charges pending against him for ten years. I find what has transpired here fundamentally unfair, Your Honor. I would ask that the remedy be that his cross examination be terminated at this time.

THE COURT: I deny that.

Are you ready?

MR. POPE: Yes, sir.

THE COURT: All right. Bring in the jury. (The following takes place in the presence of the jury panel)

[3708] THE COURT: All right.

MR. POPE: If it please the court, Your Honor.

BY MR. POPE:

Q Mr. Holmes, you have indicated on your record from August 31st of 1999, you had a conviction for throwing urine on a guard, is that correct?

A Yes.

Q Thank you.

MR. POPE: I have no further questions.

MR. NETTLES: I have no further questions.

* * *

STATE OF SOUTH CAROLINA)
) IN THE COURT OF
) GENERAL SESSIONS
COUNTY OF YORK)

THE STATE) TRANSCRIPT OF RECORD
) 90-GS-46-1196
-vs-) 90-GS-46-1197
) 90-GS-46-1198
BOBBY LEE HOLMES,) 90-GS-46-1200
) MARCH 22, 2001
Defendant.) YORK, SOUTH CAROLINA

VOLUME XI

BEFORE:

HONORABLE JOHN C. HAYES, III, JUDGE; and a Jury.

APPEARANCES:

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* * *

[Defense Expert Witness Janine Arvizu –
Direct By Mr. MacDougall]

[3762] Q And as I understand your testimony, Ms. Arvizu, these are labels representing three separate blood draws? Originally they were attached to three separate tubes of blood?

A That's correct.

Q Okay.

A The problem I have with sample integrity in this case is that this particular form is the last [3763] time that we ever see sample 5.4.2. That blood sample, after this date received of February 12th, 1990, doesn't ever appear again in any of the laboratory records as having been subject to analysis. It just seems to have disappeared off the face of the earth. Yet it's such an important sample, because the quality of sample 4.4.1 was degraded and they very much needed a known reference blood sample to compare to the unknowns in this case, but 5.4.2 just seems to have disappeared.

Q Okay. Thank you. You can have a seat.

* * *

[3765] Q I just got one other area I would like to explore with you, Ms. Arvizu.

Could you tell me from a laboratory assurance and laboratory quality standpoint what contamination means? We have heard a lot about contamination in the last week or so. What does it mean from a laboratory quality perspective?

A Well, contamination can come from a couple of sources. Contamination can be inadvertent. If the people collecting samples were processing samples [3766] are not well trained in the principles of contamination control, then blood can actually cross-contaminate pieces of evidence, just by physically touching.

In this case it's evident that at the time these samples were originally collected, the person who collected them did not have effective training in contamination control, because they jumbled different items of evidence together in a single paper bag, which would lead to cross-contamination of the evidence.

In addition to the fact that contamination can happen essentially accidentally during the course of handling evidence samples, it can also happen intentionally by tampering with evidence, by actual introduction of blood to, the evidentiary material. Actually putting, for example, a referenced blood sample on materials of evidence.

* * *

[Janine Arvizu – Cross By Mr. Pope]

[3770] Q So based on your evaluation, Ms. Arvizu, of the records in this case relating to quality assurance and laboratory controls, do you have an opinion with respect to the integrity of the blood evidence as we heard?

A Yes, I do.

Q What is that opinion?

A I would be concerned about the fact that the reference materials in this case were not controlled in accordance with appropriate practices, comprising their analytical quality, as seen by the fact that the sample was

degraded, and the fact that one of the reference samples was just completely lost or misdirected. What happened to that blood, from a laboratory quality assurance perspective, I would have expected the laboratory to have tested those samples to ensure that they didn't come from the referenced blood.

* * *

[3783] Q Aspirin – a bottle of aspirin has an expiration date?

A Yes.

Q I could still take the aspirin six months after the expiration date and perhaps it would work on my headache, is that correct?

A Perhaps it will.

Q Okay. And if my headache went away, then arguably it did. And if it didn't, then maybe it didn't work, is that correct?

A Yeah. And in this case we saw that the blood degraded, which was clearly an indication that the tube had expired and had compromised it for its intended use.

The problem is that with an expiration date, aspirin, the intended use is to give you a therapeutic dose of aspirin at that time.

Q Right.

A If you take it a year later, you won't get the same therapeutic dose that you would have if you had taken it within its shelf life.

Q Which as far as maintaining that blood, when you talk about degradation, that's what you are saying?

A That's what I'm talking about.

* * *

[Defense Expert Witness Dr. Peter D'Eustachio – Direct By Mr. MacDougall]

[3804] Q Doctor, I'm going to describe a hypothetical situation to you and I would like you to respond to it as a hypothetical, if you would, please.

The police come upon a crime scene. A victim has been badly beaten and has bled profusely. There are numerous – several articles of clothing that appear to have been stained with the victim's blood. There are articles in the bathroom that the victim has used following the attack that also appear to have blood and perhaps other bodily fluids on them.

Police officers enter the scene in numbers of four or five, total, collect up the evidence without gloves or gowns and without, you know, intermediate hand washing in between collection. Use paper bags from the victim's kitchen to store as many as three different articles in a single bag. That evidence is then collected at a police station, at a law enforcement facility, along with other articles of clothing taken from the suspect in the case.

Ultimately the entire collection of evidence, both the articles taken from the victim's home that are in the paper bags from the kitchen and the articles taken from the accused, which are also kept [3805] in similar bags are cataloged by the same officer in the same room, who, because there are multiple items, must go through each one to assure himself that that's what's in the bag, and, in

fact, does it in the following series: First, the victim's clothes and the articles taken from the victim that have the apparent bloodstains on them; then the bags containing the evidence taken from the accused.

Taking those facts as a hypothetical, doctor, what is your professional opinion with respect to how potential DNA testing subsequent to that series of events would be treated?

A It would – it would make it very difficult, if not impossible, to do reliable DNA testing afterwards, because there have just been in that scenario numerous opportunities for moving body fluids from one item to another, and moving them in quantities sufficient, given the sensitivity of the tests to make an item that either truly had nothing on it, or that had something on it, now appear to have something or something additional on it. And, of course, once blood, in particular, and saliva, those sorts of body fluids are mingled together on an item, whether that mingling happened as part of committing the crime or that mingling happened [3806] afterwards as part of handling the evidence, there is no way of getting those fluids apart again. There is no test that could tell you, well, fluid No. 1 got put down first and fluid No. 2 got put down at a later time. The technology just isn't there to do that. And so that kind of handling, that's what all of those anti – what all those sample handling precautions were intended to prevent that sort of transfer, potential transfer, of materials from one item to another that now makes it impossible to sort out which parts of a DNA typing pattern at the end of the day were there in the evidence at the time it was generated, which parts got there some other way.

Q From a layman's perspective, Dr. D'Eustachio, what effect would that process have on the ultimate DNA testing applied to articles of clothing in those bags?

A It makes the ultimate DNA test unreliable.

* * *

[3818] A Okay. This is one of those tracings, and in the same way that – and each of these spikes represents one element of a DNA typing pattern. They are separated along the tracing. That's basically what the fancy machinery does. The size of the spike happens to tell us how much DNA is in contributed to that particular spike. And the position tells us what kind of a spike it is. Is it a – is it – first, does it belong to the Smith family of spikes, or to the Jones family of spikes? And within the Smith family of spikes, what kind is it? Is it a type 13, or 14, or 15. And it's exactly that information which is actually generated – parts of which are generated automatically by a computer that's attached to the machine that does all of this and then checked by the analyst. It's that information that gets decoded to make up the final DNA typing pattern.

Q And this is limited solely to PCR STR? This is the kind of result that you get in that form of DNA testing?

A That's correct.

Q And when a scientist is or an analyst is [3819] actually testing DNA in his or her laboratory, is this what they get as a result?

A Yes.

Q And what evaluation does the scientist subsequently do after getting this type of graph?

A Well, we need to look at each of these spikes to ask basically does it make sense. Are these the kinds of patterns of spikes that you would expect for human DNA. It also turns out that both the shape of the spike and how much DNA is in it are also relevant to making that determination. And that's what – that is, in fact, the steps that the analyst at the FBI do. It's described in their protocol and it's also a step that I did as I reviewed the actual evidence in this case.

Q Doctor, recognizing what we have on the screen is solely for illustrative purposes and not from this case, did you have the opportunity to review the actual typing result graphs generated by the FBI laboratory in testing evidence in this case?

A Yes, I did.

Q In that examination, did you detect any issues that you believed bear upon the DNA results produced by the FBI laboratory?

A Yes, I did.

[3820] Q What were those?

A They were two. The first one actually applied to what I was calling before the shape of the peaks. A proper peak actually looks like a spike. That's a good description of it. I discovered in the actual evidence that there were also some peaks that looked like very low-lying mounds. These peaks, the analyst had suggested by actually writing on the original tracings were so called dye blobs.

What is a dye blob? What actually makes the – what actually makes the peaks visible to the machine is that as the PCR process is carried out, the xeroxing process that

makes many, many, many copies of the DNA molecule, those copies each get a colored chemical attached to them. And what the machinery actually detects is the color. Sometimes the colored chemical apparently comes loose from the xeroxed copy DNA and starts drifting through the tracing on its own.

According to the experts who first developed and validated this system, those drifting bits of dye, they named them dye blobs. And what they observed in studying this particular technical imperfection, this artifact, was that each time the dye blob appeared, it migrated differently. It [3821] migrated in an extremely unpredictable way, unlike all the authentic spikes. So if a particular sample of xerox copy DNA had dye blobs in it, and you tested that sample on several different days, all the spikes would appear in exactly the same positions over and over and over again. The dye blobs would wander all over the place.

Q What did you find in typing result graphs here?

A There were – there were items identified as dye blobs, and – but contrary to the ones described by the developers to the system, these dye blobs were perfectly reproducible. When a sample was rerun, they appeared in the identical position. More than one sample, in fact, was affected by dye blobs. And as he went – as I went from sample to sample, I saw the items that were labeled as dye blobs again appearing in the identical position.

So from that I conclude that these are not – that this is some other kind of technical imperfection and not the known imperfection, which we know how to deal with and interpret away from the rest of the evidence. This is some

other kind of imperfection that we don't necessarily know how to account for.

Q And again, in layman's terms, doctor, what does [3822] that mean with respect – as we look at the graph here, what does that mean with respect to the test results in this case and specifically the graphs that you looked at?

A Right. In order to interpret a graph, in order to draw a scientifically reliable conclusion from a graph like this, we need to be able to account for each and every feature in that graph. We're not allowed to say well, here is some features that I recognize and I like, so I'll interpret them; here are some other features that I don't necessarily recognize or understand or like, I'm not free to ignore those. I need to be able to have a scientifically satisfactory explanation for each and every feature of the graph before I can say this is a reliable graph, I know what it means as a matter of science.

Q What does all this have – what effect does this have on your scientific evaluation of the DNA results in this case, specifically the STR PCR?

A Yeah – I'm sorry, I started before you finished.

Q Finish, please.

A It makes me – as I just said, that makes the results unreliable, because I can't interpret all [3823] features of them.

Q Okay. Thank you.

* * *

BY MR. MACDOUGALL:

Q Dr. D'Eustachio, two of the items of evidence that were subject to DNA analysis in this case, and both of which are in evidence, are State's Exhibit 13 and 20. And we have seen photographs of them. I won't take the time to take them out, but I'll represent to you that this bag, paper bag, contains State's Exhibit 20, which is the underpants alleged to have been taken from the defendant in this case. And State's Exhibit 13 is the paper towel taken from the home of Ms. Stewart.

Those two exhibits were assigned and those two pieces of evidence were assigned numbers at the FBI laboratory because they were both questioned Those were – and we have heard extensive testimony, those were labeled Q-5 and Q-6.

In the course of your review of the DNA testing in this case, did you specifically have the [3824] opportunity to evaluate the DNA, and specifically PCR STR testing, as it related to Q-5 and Q-6, the underpants and the paper towel?

A Yes, I did.

Q Did you develop any conclusions with respect to the validity of the tests as it relates to the underpants and the paper towel?

A Yes, I did.

Q What did you find?

A Well, the analyst looked at each of those specimens and concluded that the DNA on them was a mixture,

a conclusion that I agree with. The reason for that conclusion was that there were more different DNA types on each item than any one person can generate out of his or her own DNA.

The analyst also reached, as I recall, the additional conclusion that that mixture was – could have come – could have been generated by combining some amount of DNA from Bobby Lee Holmes with some amount of DNA from Mary Stewart. And, once again, I had – I don't believe that that is a reliable conclusion, because, once again, not all features of the relevant part of the relevant DNA typing pattern are accounted for.

Specifically what I found – I mean, in looking [3825] at one of the DNA markers, we could call it the Smiths, was that Mary – one of the individuals, I believe Mary Stewart, was expected to give a type 16 – a type 14 spike and a type 16 spike. The other, Bobby Lee Holmes, was, if I remember right, supposed to give a 15 spike and a 16 spike. And, indeed, in the evidence one sees some amount of 14 spike, a 15 spike and a 16 spike, but there was also very clearly, and at least on one round of testing these items, also an additional spike, an 18 spike. There wasn't very much of that DNA, but it was of an amount that is appropriate to analyze and account for when one is testing mixtures. And the importance of it is that we know from looking at their known standards that neither Bobby Lee Holmes nor Mary Stewart is capable of producing type 18 DNA. They literally just don't have it in them. And so to get type 18 DNA on that evidence, either it had some other history before being picked up, or it acquired some amount of contamination thereafter. I can't tell you as a matter of science which of these two interpretations is correct.

Q Doctor, just to cut to the chase, with regard to the underpants –

A Yes.

[3826] Q – what does that mean?

A It means that I can't say. It's not – it's not a reliable conclusion that that mixture is consistent with deriving from Bobby Lee Holmes and Mary Stewart, no more, no less.

Q Are you able to detect what else is in there, if anything?

A Type 18 DNA.

Q Whose is that?

A No one that I know about from the materials that I got in this case.

Q Okay. Just finishing up, doctor, you talked about some specific aspects of the DNA typing. Could you give me your opinion as a scientist and as an expert in DNA how you would evaluate the DNA testing that was done of the evidence overall in this case?

A At the end of the day, it's unreliable tests. The – it wasn't – it wasn't handled in the way that we now know is necessary to prevent contamination from one item to the next or from outside sources. Known samples, which should give us high quality views of those peoples DNA were clearly degraded. Known samples were handled too close together in time and place with some unknown [3827] samples. And finally, there are some features of the – where the tracings need to be completely interpreted and accounted for in order to be scientifically reliable. There

are some features of those tracings that did not get interpreted, and it adds up to a test that is not reliable.

* * *

[Dr. Peter D'Eustachio – Cross By Mr. Pope]

[3844] A That's the standard that's used. If we got a clean difference, then we are looking at DNA from two different people.

Q There was no indication of that in anything that you reviewed, was there?

A There is that type 18 DNA that I can't account for.

Q And where did that come from?

A That was in both the Q-5 and the Q-6 specimens. There was a hint of some type 18 DNA running around. Type 18 for –

Q Do you know what locus it was? Allele, I guess?

A D13S – there's –

Q I'm listening, sir.

A I just ran out of words.

Q I will –

A It's at D13S and then there is a whole string of numbers, which I do not remember.

Q Okay. Let's see if I can dig that up for you, [3845] sir. It's not D3S1358?

A Could I look at that one sheet, if possible?

Q Yes, sir, be glad for you to.

A That's the piece of the report there.

Q Be sure I give you the right page.

A Right, that would be D3S1358.

Q D3S3158 you said that you found some 18?

A That – that showed up on the original tracing, yes, and on the – and in the lab report there was actually – there were both the tracings and then there was a print-out, a summary for each round of analyses that was done. And it showed – and it was logged on those summaries as well. That's – that's not – that's a summary inside the lab report, not the final report that the SLED lab got back to the FBI.

Q And this was the agent – I'm going to mispronounce his name, Baechtel's report, is that correct?

A That's correct, we are talking here entirely about Agent Baechtel's report on the PCR STR.

Q So after evaluating all these different sheets and forms that you had indicated, this is the report that he gave, is that correct?

A That's right.

[3846] Q Okay.

A That's right.

Q Based on his experience and forensic ability and testing, he determined that this was, in fact, a match, and you disagree with that, is that correct?

A That's correct.

Q Okay.

A Yeah, exactly. I am – I am looking at the same things that he did, and he says – he doesn't – he, at the end of the day, says I don't need to think about that type 18, because he doesn't record it in his report.

At the end of the day I say from, my scientific experience, hold on, I don't think we know enough to be able to stop thinking about the type 18.

* * *

[Defense Expert Witness John Kilbourn –
Direct By Mr. Nettles]

[3882] A From the moment a scene is discovered and the investigation is complete, to the very end of the case when the forensic fiber analyst packages up the evidence for the last time, every effort should be made to prevent any type of contamination. From losing evidence to the introduction of contaminants, such as fibers or hairs from you as an individual, or from coming in contact with the suspect, every precaution should be made so that that does not occur. We are dealing with such minute quantities of evidence, that these can easily be transferred and never be seen. So every effort must be taken, safeguards, so that that doesn't occur.

Q So, in other words, is it possible, giving you a hypothetical, if I handle some fiber and then I later handle some other fiber, is it possible, is [3883] what this is addressing, for me to transfer – for me to be a conduit from fiber from one item to another?

A Yes, sir.

Q I'm going to ask you about the following statement. "Protective clothing should be worn by crime scene personnel, by scientific staff, and by medical doctors

taking part in any aspect of searching." Do you agree with that?

A Yes, I do.

Q Why is that?

A Once again, we don't want to introduce or take away from that individual or from that scene any type of physical evidence. So by putting on a paper gown, putting on a white cotton lab coat, I preconvenient fibers from my clothing from being transferred into that scene or onto that deceased individual. If we lose some white cotton, that does not have really any significant forensic evidentiary value. But the nylon fibers that I might have on my shirt indeed would cause contamination and could cause some problems.

Q Let me ask you this. In relation to the last two issues that you and I just discussed, "a rather special form of contamination, which has perhaps not [3884] been given sufficient weight, is the potential sharing of fibers from a common source when individuals share a common or close environment." Does that, in effect – do you agree with that statement?

A Yes, I do.

Q Does it serve to encapsulate the last two issues that you just discussed?

A Yes, it does.

Q Now, let's talk for a second about testing. Would you agree with this statement. "Different rooms should be used to search items from different sources, scenes or

people. And these rooms should be physically located some distance from each other."

A Whenever possible, yes, sir.

Q And why should they – why should there be two separate rooms, whenever possible?

A Once again, to try to do everything that's humanly possible within reason to prevent contamination.

If we go into a room with the suspect's clothing and we make an examination in this room, then we package up the suspect's clothing and get out the victim's clothing in the same room, there [3885] may have been some trace evidence, such as fibers, that may have been lost or dislodged from the suspect's clothing and may be transferred onto the victim's clothing during our examination. And, you know, without realizing that, we then find similar fibers on both the victim's and the suspect's clothing. And one would come to the conclusion that it's possible that these two individuals had come into contact with each other. By doing this in separate rooms, we limit that possibility of contamination.

* * *

[3886] Q What does scraping fabric material mean?

A Scraping is basically where we either hold up a garment or in some cases have like a steel rod or a PVC rod and we use clothespins or some other apparatus to hold the garment up in the air. And this is normally done over a fairly large table and white butcher paper is placed on top of the table. And then a large spatula, just like a real big cake spatula, is used and the clothing is scraped down using this spatula. And what we are attempting to

do is to dislodge materials that's adhering to the surface of the clothing causing those to drop down onto the paper, and then we collect that debris for later examination.

Q What's the second major method that's used for the collection of fiber?

A This is what is known as the tape lifting method. Here we take a clean piece of butcher paper and we place it on a table, and then we place the garment down on the surface of the paper. And then [3887] we take cellophane tape. Rather than being small scotch tape, we use tape that's about four inches wide. We pull off a strip maybe eight to ten inches in length, and then we will place that sticky tape down on the garment and maybe rub across the top of the tape and then lift it off. And what we are attempting to do is to collect any loose particles, fibers, hairs, pollens, whatever types of materials that would be on that clothing. It adheres to the adhesive part of the tape. We may do this. only once. We may do this several times in a given area. Then we transfer that to a clear plastic bag or a piece of acetate, like a clear page cover, something I like that, something that we can visually see through. And we do that in a stepwise manner, systematic cover, covering the whole garment, both back and front, and sometimes the inside and outside, with this sticky tape in order to collect all the debris from this particular garment.

Q Of those two methods, which is the more – which is the preferred method?

A The most preferred method in being – having the ability to collect more of the evidence and with less contamination is by the tape lifting method.

Q I show you what i the Forensic Science [3888] Handbook, Volume II, by Richard Saferstein.

A Yes.

Q Do you recognize this to be a learned treatise in the field of forensic science?

A Yes, sir.

I'm going to read a passage, a short passage, and I ask you if you agree with me.

"If forensic laboratories are to collect, identify, compare small particles of fiber, the scraping method cannot be used. The reason for this, of course, is that one cannot be certain that contamination of questioned exhibits with knowns is not occurring, since fiber and other small particles may be suspended in the air for long periods of time, only to settle out on that large piece of wrapping paper, to be later scooped up and mounted on a slide."

Do you agree with that statement?

A Yes, sir.

* * *

[3889] Q Okay. Now, we have already discussed and you told us different rooms should be used?

A Yes.

Q Would you agree that different examiners should agree – should examine the suspect and the known samples?

A I don't believe that that's an absolute necessity, but if only one examiner does make the examination, then

there should be significant precautions that are made. Primarily that if they are done in – hopefully in separate rooms. The individual that is doing the examination should examine one item of clothing on one day and then – say the victim's clothing on one day, and then wait until the next day to examine the suspect's clothing. If that's not feasible, then at least the individual doing the examination should at least put on a clean lab coat and not use the same lab coat. [3890] Once again, to do everything that's possible to prevent contamination and cross-transfer of evide ce.

Q Now, let me ask you this. Have you had the opportunity to review the report that was done by SLED Agent Barron, is that correct?

A Yes.

Q And the testing that he did?

A Yes.

Q Were there other tests that were – that, in your professional opinion, you feel should have been done that were not?

A On the examination of the fibers?

Q Yes, sir.

A Yes.

Q Well, share with us what tests you think should have been done.

Well, let me ask you this then. Is one of those tests the FTIR test?

A Yes.

Q What does that stand for?

A FTIR stands for Forrier Transform Infrared Spectroscopy, which is a big word. That is an instrumental method that forensic scientists and chemists utilize to identify, and on many occasions, [3891] compare chemical compounds. And we could take a very small amount of sample, even a small – a very small fragment of a fiber, and we can, by running FTIR analysis, determine the exact chemical makeup of that fiber.

* * *

Q Let me ask you about this. How about the Optical Property Refractive Index Measurement?

A Yes.

Q Is that a fairly common test?

A Yes.

Q Okay. Is it – tell us a little bit about that.

A What we are saying here is looking at one of the properties of these fibers that we describe as optical properties. In some respects Mr. Barron examined the optical properties, because he took the fiber. He mounted it on a microscope slide in a mounting media. He put a cover slip on it, looked at it through a polarizing light microscope. And by making these observations he was able to tell what kind of fiber. And every good fiber analyst should be able to look at a fiber and in most cases tell what the fiber is.

[3892] He looked at a fiber, a blue fiber, and he said this is – based on the optical properties that I'm observing, this is an acrylic fiber. This black fiber is a polyester. And

another black fiber is a cotton. And finally there was a gold fiber, that he identified as a modacrylic fiber. So he did indeed do – measured optical properties.

An additional method that he could have used and one that many forensic scientists, fiber examiners, use, and one that I use, is taking it a step further and measuring specific optical properties. In this case it's called the refractive index. And all crystalline materials, transparent materials, have the ability for this optical property to be measured.

Refractive index, in the most simple terms, is we note, refractive index, whenever you take a pencil or a stick and you put it in a glass of water, you notice that it looks bent or broken. And the reason is that that the light passing through the water passes through it at a lower velocity than the light passing through the air above – or at the top of the glass above the water.

So we can measure these optical properties. It's a test that is nondestrucive. It takes time to [3893] do it, but is one that I feel like is essential, because we may have two fibers that are – appear to be exactly the same microscopically. They appear to be two blue acrylic fibers, but by measuring the refractive index, we may find that indeed they are different because they have different refractive indices.

Q Okay. And the last one is this. You reviewed the tests that were done, correct?

A Yes.

Q And was sufficient testing done, in your opinion, to make the opinion that the dyes were – that the dyes were identical?

A No.

Q Okay. Why is that?

A Well, Mr. Barron did do some tests on the color. He – first of all, he examined it visually. He most probably looked at it under a comparison microscope, where he *was* looking at the known and the unknown and seeing if they were the same color.

He also did a test, an instrumental analysis, called a microspectrophotometer, a visible microspectrophotometer, which measures the color and tell you whether or not the color between these two fibers are indeed the same.

[3894] However, in order to analyze the dyes and say that the dyes are identical, the dyes have to be removed from the fiber and then some type of testing has to be done to determine whether or not indeed the same pigments are present in the known and unknown fiber.

Q Is that sort of like taking a paint chip to a paint place and having them mix it?

A Yes.

Q Now, if, in terms of the testing that you saw, the word match was used. In your professional opinion, do you find – what word do you use when you arrive at the same conclusions that Mr. Barron had?

A I normally in a case like this will say that two fibers are consistent with each other.

Q What, in your mind, is the difference between consistent and match?

A I personally don't have any problem with either term, because I understand the meaning of that. And if I was talking to another forensic scientist and we were talking about a match, both of us would understand the limitations of that.

Q What are those limitations?

A Well, basically that you cannot say that a [3895] fiber came from a particular garment.

Q Okay.

A And it's easy when you use the term match for individuals that are not familiar with these forensic terms to think, well, if I match this fiber to the fibers in this blanket –

Q Right.

A – that they may think that I mean that fiber had to come from that blanket.

Q Why can't you say that?

A Because fibers are mass produced.

Q Right.

A And in this particular case where we have a black sweat shirt having black cotton and black polyester fibers, we basically do not have any way of knowing how many hundreds or thousands of those black sweat shirts were produced by this company.

Q Right.

A Furthermore, we don't know how many other companies use these black fibers to also make black sweat

shirts. And we also don't know how many other types of garments might have been made with the same color, black polyester and cotton, that was manufactured.

* * *

[3896] BY MR. NETTLES:

Q Now, recognizing there are limitations to what you can do, because you don't have the actual fiber in this picture, but would you agree with me that at least the possibility exists for a number of different types of fiber to be found just in the confines of this picture?

A Oh, yes, most certainly.

Q Okay. And based on what? I mean, how about tell us a little bit about this carpet at the bottom here.

A Well, first of all, we have a variety of colors to start with. And, you know, if you have a red fiber and a gold fiber, they are different fibers. They came from two different sources, basically, unless it's a mixture of both gold and red fibers. But there we can see that there are a whole variety of colors of fibers. That would be our first examination.

Now, whether those fibers are acrylic, or polyester, or nylon, without actually making an examination, we really don't know what the fibers would be.

[John Kilbourn – Cross By Mr. Pope]

[3912] Q So you said basically whether you say consistent or match, in that context its different than a DNA match, but it matches within the realm of your field, is that correct?

A Well, you just have to be very careful how those terms are interpreted. If you use the term DNA match, people, I feel – at least I do, that where you are talking about unique to that individual or the statistical is such that, you know, it's one in ten thousand, or something like this. So that's the reason I stay away from that term and use consistent with, because I'm not saying that this is unique and that there is one in ten million chances that that fiber came from another sweat shirt. What I'm saying is that – the only thing that I can say is that that fiber looks like the unknown – the known and the unknown looks the same, and whatever other measurements we might make, including those that SLED made, as well as those that I additionally proposed, whatever factors that [3913] we have, that's the way we come up and say that the two are consistent.

Q And is this a fair statement – same microscopic characteristics, is that a fair statement?

A Yes.

Q So we are basically saying it three different ways, saying the same thing? You are just trying to make sure to distinguish it from something as precise as DNA?

A That's correct.

Q And, again, using the DNA example, you can't say that a fiber came from a particular garment? You can just say look, I got these fibers. They're on these things and they match, unless, of course, as in this case where the fiber was actually removed as a known from the black one. That's the only way that you could tell if it came from a particular garment, is if you pulled it off that garment, is that right?

A That's exactly correct.

* * *

[Defense Expert Witness Donald Girndt –
Direct By Mr. Morton]

[3944] Q Do you know whether currency in this case was subjected to fingerprint analysis or not?

A I don't believe I saw a fingerprint report on currency, no.

* * *

[Donald Girndt – Cross By Mr. Pope]

[3965] A I didn't see an indication it was fabricated, but I can show you that in the latent itself are some striations that I did not observe in the door then I went over to look at the actual door.

Q And back in January of 1990, what day of that month did you go look at that door?

A I did not go look at it in 1990. I looked at it in January of this year.

Q Ten years later?

A That's right.

Q Okay.

A I'm just saying that when I looked at it, I did not see striations.

* * *

[3966] Q And the fingerprinting currency, did SLED always fingerprint currency on every robbery case?

A When it was submitted. Whatever was submitted to the fingerprint laboratory was printed.

* * *

[Donald Girndt – Redirect By Mr. Morton]

[3989] Q Agent Girndt, we don't know where this palm print came from, do we?

A Not with the material that I was provided, no.

Q With the material that you were provided and with the photographs that were taken, you don't know – there is no way to tell where that left palm print came from, is that fair?

A No, I can't.

Q Let me show you what's been marked – did you have see the photograph of the fingerprint from the outside of the door?

A Yes.

Q And I know it's here somewhere. And do you [3990] remember – here it is. It's Defendant's Exhibit No. 22.

Do you see background, any background noise in there?

A Yes.

Q What is that typical of, in your experience?

A This particular surface exhibits what appears to be some water spots, kind of like rain would get on the surface of a car, surface of the door, or something like that. The fingerprint powder will actually show you where the moisture was at one time, so this appears to be some water spots.

Q Okay. And you have observed, once again, the photograph of State's Exhibit 15, which is the palm print?

A Yes.

Q And what does the background in that typically exhibit? What is that most typical of, in your experience?

A It's typical of a latent on a background that's perhaps been painted with a paintbrush.

Q And you have observed the photograph that was taken on January the 1st of 1990, or December 31st of '89, correct?

A Yes.

[3991] Q And you have also observed the door at a later date that was at Ms. Stewart's apartment, correct?

A Yes.

Q Did you see evidence of paintbrush strokes where this print was taken from? Can you say that?

A No, I did not observe any.

* * *

[Defense Witness Tina McCombs Bells –
Direct By Mr. Morton]

[4022] Q And do you know this young man right here?

A Yes.

Q Let me ask you a little bit – how do you know him?

A He's my brother.

Q He's your brother?

A Uh-huh.

Q Is his hair about the same length as it was on that morning?

A Yes.

Q Okay. And how old was he on December the 31st of '89, do you know?

A Seventeen.

Q Okay. And were you with him that day?

A Yes.

Q And had you been with him all day long that day?

A Yes.

Q And had you been with him and his friends that evening?

A Yes.

* * *

[4028] Q Okay. What happened at your house next?

A About 8:30 – 8:00 or 8:30 the officer come, Boot and George Thompson.

Q Officer Boot Smith?

[4029] A Uh-huh.

Q And that would be Sergeant Smith from the York Police Department?

A Yes, sir.

Q Came to your house at what time?

A 8:00 or 8:30 that morning.

Q And –

A Asked.

Q And who?

A And George Thompson.

Q George Thompson.

A Uh-huh.

Q Who is George Thompson?

A He hanging with Boot. He hanging with the officer.

Q He was in the car with Boot Smith at eight o'clock in the morning?

A Yes.

Q At your house?

A Yeah. When they come to the door, they was together.

Q And what were they doing?

A They just told me they wanted to ask me some questions, come downtown. So I went downtown to the police station.

[4030] Q Did they give you a choice about whether to go, or did you volunteer to go with them, or what?

A When I got down there, they told me about Bobby Holmes told me to come down there, that he had –

Q Wait a minute. Wait a minute. Hold on. They came to your house?

A Uh-huh.

Q And they asked you some questions?

A No, they just told me to come downtown to the police station.

Q And this is officer – Sergeant Smith, along with George Thompson?

A Uh-huh.

Q And they told you to come down to the police station?

A Uh-huh.

Q And when you got down to the police station, they started asking you some questions about Bobby Holmes?

MR. THOMPSON: Objection, Your Honor. He's leading.

THE COURT: Yes.

MR. MORTON: I was just – she had already said –

THE COURT: I know, I know, but I think I'm more concerned about the next questions that's going [4031] to follow that into it.

MR. MORTON: I understand.

BY MR. MORTON:

Q And what questions were they asking you about Bobby Holmes?

A They asked me about some stolen cars. Asked me did he steal any cars.

Q Okay.

A That's the question they was asking me.

Q Okay. And you talked to them about that?

A Yes.

Q And how long did you have to stay down at the police station?

A An hour.

Q And was Terrence Digsby there too?

A Yes, he was.

Q Were they asking him those same questions?

A Yeah, but we was in different rooms.

Q Okay. Well, how do you know they was asking him the same questions?

A Because one of the officers came back and told me they were asking him questions and he was telling – the officers were telling him that Terrence said yeah, Bobby stole two cars, and they wanted me to witness to it that he did it.

* * *

[4042] Q Now, when you got – you said Boot Smith came to your house at about four o'clock that morning? Oh, I'm sorry, about – what time was it?

A It was about 8:00, 8:30.

Q And he had someone named George Thompson with him?

A Yes, he did.

Q George Thompson is not a police officer, is he?

A No, he's not.

Q And when Boot came, he told you that he wanted to ask you some questions, if you come down with him, right?

A He told me to come downtown.

Q And like you said a little bit ago, he said he wanted to ask you some questions?

A Yeah, when I got to the police station I said.

[4043] Q Right. Right. And you went down with him, right?

A Yes, I did.

Q He didn't arrest you, did he?

A No, he told me that – they told me if he couldn't find Bobby Holmes, that they are liable to charge me – what you call it when they can't find a person and they see it's a person running – I forget what they said. But he said he would like charge me for that.

* * *

[Defense Witness Lucille Tolbert –
Direct By Mr. Nettles]

[4065] Q Now, how far were you from – was there a church near your trailer?

A Central Baptist.

Q Yes, ma'am. And where was that in relation to where you lived?

A Okay. My trailer sit like this.

Q Okay.

A A bunch of bushes, and bushes, and the gutter was right here.

Q Yes, ma'am.

A Central Baptist Church is here.

Q Okay. And I'm showing you what we have marked before you got here, so we can keep up with it, its called Defense Exhibit 32.

A Uh-huh.

Q Do you recognize that right there? Is that the church?

A This is the back of it, yes.

Q Yes, ma'am. So you are kind of back over here behind it?

A I'm –

Q Just point it out so they can see.

A I'm straight past that. Straight past that across the field is my trailer.

[4066] Q Okay. Well, it's not where you live any more, though, right?

A No.

Q But you lived there at the time?

A Yes.

Q And were you living there on December 31st of 1989?

A Yes.

Q Okay. In the morning of December – well, did – sometime around December 31st of 1989, did you receive a knock at your door early in the morning?

A Yes.

Q And tell me about that. Tell me – tell me about how – what time did you get up that morning?

A I got up, it was between 5:30 and 6:00 o'clock in the morning.

Q All right. And how – and if you don't mind me getting too personal, how is it that you know that you got up between 5:30 and 6:00 o'clock?

A Because I have my clock set every morning for that. I'm a diabetic.

Q Yes, ma'am.

A And my time for taking my shots is six o'clock in the morning.

[4067] Q And so you know that – so sometime between that time you woke up?

A Yes.

Q You cut on the light?

A Uh-huh.

Q And as you said, there was a knock at the door at some point?

A Not the time I got up. Shortly after I got up.

Q Okay. And what did you do when you heard that knock at your door?

A I turned around. I was in the kitchen.

Q Uh-huh.

A I turned around and I went to the door.

Q Uh-huh.

A And I unlocked the door.

Q Uh-huh –

A It was a young man standing there.

Q Okay.

A And that's – I looked at him and he said "ma'am, could I have glass of water, please?"

Q Yes, ma'am.

A And I said –

Q So what did you do when he asked you that?

A I said sure, and I turned around, went up my hall and went to the refrigerator.

* * *

STATE OF SOUTH CAROLINA)
) IN THE COURT OF
COUNTY OF YORK) GENERAL SESSIONS

THE STATE) TRANSCRIPT OF RECORD
) 90-GS-46-1196
-vs-) 90-GS-46-1197
) 90-GS-46-1198
BOBBY LEE HOLMES,) 90-GS-46-1200
) MARCH 23, 2001
Defendant.) YORK, SOUTH CAROLINA

VOLUME XII

BEFORE:

HONORABLE JOHN C. HAYES, III, JUDGE; and a Jury.

APPEARANCES:

THOMAS E. POPE, SOLICITOR
WALTER WILLIAM THOMPSON,
ASSISTANT SOLICITOR
KEVIN BRACKETT, ASSISTANT SOLICITOR
E.B. SPRINGS, IV, ESQUIRE
Attorneys for the State.

WILLIAM N. NETTLES, ESQUIRE
JAMES M. MORTON, ESQUIRE
MARK J. MACDOUGALL, ESQUIRE
JONATHAN M. KRELL, ESQUIRE
JEFFREY BLOOM, ESQUIRE
HEATHER J. PELLEGRINO, ESQUIRE
Attorneys for the Defendant.

* * *

[Prosecution's Closing Statement]

[4195] So let's go now to what is the basis of the State's case and the basis of the defense attack to the State's case: Somebody leaves something at the scene or takes something away. It could be property that you took away. It could be fiber evidence, blood, DNA, latent prints. It could be taken away. It can be left. And I submit in this case you have all of that. You have an abundance of that.

Stolen property. What do we have? We have his wallet. It was recovered. And do you remember the victim said $40.00. $40.00 was taken. She told some of her friends, and we had her friends come and talk about cashing her check, and $40.00 was taken. And I want you to notice there is $44.00. So you don't have the exact amount, but you have got the defendant, when he's arrested that morning, [4196] presumably having been in bed since he got home from the crime, in his wallet he has $44.00.

* * *

[4215] So if Mr. Holmes didn't commit the crime, that's one explanation. Mr. Holmes did it. You got his palm print. You got his DNA. You know, their DNA guy said well, I have got some concerns because, you know, had that 18, but he also said Dr. Baechtel, who does this every day, his job to read and analyze that, and he read that as a match. So you put the weight on it that you want to put.

* * *

[4220] So the bottom line comes down to the defendant was framed. That's the only possible answer. Let's see what that would entail.

Ladies and gentlemen, if we are going to frame somebody, we have got a horrible, horrible crime. And you are

going to frame somebody, why Bobby Holmes? Because if you get Bobby Holmes and you frame this guy – and you have to admit as much evidence as there is, a lot of work goes into framing somebody. And if you are going to frame them and it's going to be Bobby Holmes, where is this raping, murdering, beating fellow that actually did this thing? If they're out there to protect the community, what goal of putting Bobby Holmes in jail and leaving this guy running the street to do it again?

* * *

[Verdict Of The Jury (Guilt Phase)]

[4350] THE COURT: Mr. Foreman, I understand the jury have reached a verdict?

JURY FOREMAN: Yes, sir.

THE COURT: If you will hand them up by way of the bailiff.

THE CLERK: Indictment 90-GS-46-1200 for robbery, "we, the jury, unanimously find the defendant Bobby Lee Holmes guilty of robbery."

Signed by foreperson, March 23rd, 2001.

Indictment 90-GS-46-1197, "we, the jury, unanimously find the defendant Bobby Lee Holmes guilty of burglary."

Signed by the foreperson, March 23rd, 2001.

Indictment 90-GS-46-1196, "we, the jury, unanimously find the defendant Bobby Lee Holmes guilty of criminal sexual conduct in the first degree."

Signed by the foreman, March 23rd, 2001.

Indictment 90-GS-46-1198, "we, the jury, unanimously find the defendant Bobby Lee Holmes guilty of murder."

* * *

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF
	)	GENERAL SESSIONS
COUNTY OF YORK	)	
THE STATE	)	TRANSCRIPT OF RECORD
	)	90-GS-46-1196
-vs-	)	90-GS-46-1197
	)	90-GS-46-1198
BOBBY LEE HOLMES,	)	90-GS-46-1200
	)	MARCH 25, 2001
Defendant.	)	YORK, SOUTH CAROLINA

VOLUME XIII

BEFORE:

HONORABLE JOHN C. HAYES, III, JUDGE; and a Jury.

APPEARANCES:

THOMAS E. POPE, SOLICITOR
WALTER WILLIAM THOMPSON,
ASSISTANT SOLICITOR
KEVIN BRACKETT, ASSISTANT SOLICITOR
E.B. SPRINGS, IV, ASSISTANT SOLICITOR
BETTY MILLER, ASSISTANT SOLICITOR
Attorneys for the State.

WILLIAM N. NETTLES, ESQUIRE
JAMES M. MORTON, ESQUIRE
MARK J. MACDOUGALL, ESQUIRE
JONATHAN M. KRELL, ESQUIRE
JEFFREY BLOOM, ESQUIRE
HEATHER J. PELLEGRINO, ESQUIRE
Attorneys for the Defendant.

* * *

[In Camera Hearing On Use Of Third-Party Guilt Evidence During Sentencing Phase]

[4404] THE COURT: All right. Is the State ready to proceed?

MR. BRACKETT: The State is ready, Your Honor.

THE COURT: Does the State have any matters we need to take up before we move forward?

MR. BRACKETT: I believe the third-party –

THE COURT: I asked did the State have any.

MR. BRACKETT: No. I'm sorry, I might misheard.

THE COURT: Does the defendant have anything.

MR. NETTLES: Well, Your Honor, yes, we ask the court to revisit the issue of third-party guilt.

The admissibility of that in the penalty phase, I feel like it's been argued, it's been briefed. If the court has any questions, I'll be happy to field them, but, otherwise, I would rest on the previous argument that we made in Spartanburg and I would rest on the brief that was filed.

THE COURT: I have got it right here. I'm going to deny the motion. I have read and have here with me, but I have read and reread, and I'm not going to give the citations. I think all of you have them. And I think most of you are familiar with these, Lockett v. Ohio, Chambers

* * *

STATE OF SOUTH CARCLINA	)	
	)	IN THE COURT OF
	)	GENERAL SESSIONS
COUNTY OF YORK	)	
THE STATE	)	TRANSCRIPT OF RECORD
	)	90-GS-46-1196
-vs-	)	90-GS-46-1197
	)	90-GS-46-1198
BOBBY LEE HOLMES,	)	90-GS-46-1200
	)	MARCH 28, 2001
Defendant.	)	YORK, SOUTH CAROLINA

VOLUME XVI

BEFORE:

HONORABLE JOHN C. HAYES, III, JUDGE; and a Jury.

APPEARANCES:

THOMAS E. POPE, SOLICITOR
WALTER WILLIAM THOMPSON,
ASSISTANT SOLICITOR
KEVIN BRACKETT, ASSISTANT SOLICITOR
E.B. SPRINGS, IV, ASSISTANT SOLICITOR
BETTY MILLER, ASSISTANT SOLICITOR
Attorneys for the State.

WILLIAM N. NETTLES, ESQUIRE
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MARK J. MACDOUGALL, ESQUIRE
JONATHAN M. KRELL, ESQUIRE
JEFFREY BLOOM, ESQUIRE
HEATHER J. PELLEGRINO, ESQUIRE
Attorneys for the Defendant.

* * *

[Verdict Of The Jury (Sentencing Phase)]

[5737] THE COURT: Mr. Foreman, I understand the jury has reached a verdict.

JURY FOREMAN: Yes, sir, we have.

THE COURT: If you will hand it up by way of the bailiff.

All right. This is the State of South Carolina versus Bobby Lee Holmes, in the Court of General Sessions, 90-GS-46-1198.

Jury's verdict on proof of aggravating circumstances. We, the jury, in the above-entitled case unanimously find beyond a reasonable doubt the existence of the following statutory aggravating circumstances:

1. The murder was committed while in the [5738] commission of criminal sexual conduct.

2. The murder was committed while in the commission of burglary.

3. The murder was committed while in the commission of physical torture.

Its signed by all twelve jurors.

Jury's determination for sentence to be imposed: We, the jury, in the above-entitled case unanimously recommend that the defendant, Bobby Lee Holmes, be sentenced to death.

It is signed by all twelve jurors.

* * *

[5749] THE COURT: Mr. Holmes, the sentence on the charge of robbery –

THE DEFENDANT: Man, I don't want hear. I don't want to hear that, man.

THE COURT: – is fifteen years concurrent.

THE DEFENDANT: I don't want to hear that.

THE COURT: Criminal sexual conduct –

THE DEFENDANT: I don't want to hear it, man. [5750] I don't want to hear you. I don't want to hear you. I don't want to hear you.

THE COURT: – first degree – thirty years concurrent on criminal sexual conduct in the first degree.

Life for burglary, concurrent.

The death penalty for murder.

* * *

[Defense Exhibit #56]

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

CARROLL A. CAMPBELL, JR.
Governor

ROBERT M. STEWART
Chief

[SEAL]

4400 Broad River Road (J.P. Strom Boulevard)
• Mail: P.O. Box 21398 Columbia, South Carolina
29221-1398 • Phone: 803/737-9000

March 9, 1990

TO: William C. Mobley
York Police Dept.
P. O. Box 500
York, SC 29745

LABORATORY FILE NO: L90-0010
SEROLOGY REPORT

SUBJECT(S): Bobby Lee Holmes

VICTIM(S): Mary Stewart

This is an official report of the South Carolina Law Enforcement Division Criminalistics Laboratory and is to be used in connection with an official criminal investigation. These examinations were conducted under your assurance that no previous examinations of person(s) or evidence submitted in this case has been or will be conducted by any other Laboratory or agency.

Robert M. Stewart, Chief
South Carolina Law Enforcement Division

ITEM(S) SUBMITTED

1. Brown bag #1 containing:
   - 1.1 One (1) blue and black robe
   - 1.2 One (1) pink night gown
   - 1.3 One (1) pair flowered bedroom shoes
2. Brown bag #2 containing bedding from victim's bed:
   - 2.1 White sheets
   - 2.2 Flowered sheet
   - 2.3 Two green pillow cases
   - 2.4 One (1) flowered pillow case
3. Brown bag #3 containing:
   - 3.1 Pink robe
   - 3.2 Pink night gown (Mary Stewart)
   - 3.3 White rag
4. One (1) Sexual Assault Kit (Mary Stewart) taken from Devine Saviour Hospital
   - 4.4.1 Blood
5. One (1) Sexual Assault Kit (Mary Stewart) taken from Charlotte Memorial Hospital
   - 5.4.1 Blood
   - 5.5 Saliva
   - 5.6 Smears (rectal)
   - 5.7 Vaginal swab
   - 5.8 Rectal swab
6. One (1) Sexual Assault Kit (Bobby Lee Holmes) taken from Devine Saviour Hospital
   - 6.3.1 Blood
7. One (1) white rage (bag #7)
8. Brown envelope #8 containing one (1) blue tank top from subject.
9. Brown envelope #9 containing one white paper towel

10. Brown bag #10 containing one (1) black Gamecocks baseball cap (Bobby Lee Holmes)
11. Brown bag #11 containing one (1) pair Nike tennis shoes (black) from Bobby Lee Holmes.
12. Brown bag #12 containing one (1) pair Bugle Boy blue jeans from Bobby Lee Holmes.
13. Brown bag #13 containing one (1) pair mens white shorts from Bobby Lee Holmes.
14. Brown bag #14 containing one (1) black sweat jacket (Bobby Lee Holmes.
15. Brown bag #15 containing a white plastic bag containing
    - 15.1 One (1) blue and white striped shirt
    - 15.2 One (1) black sweat shirt
    - 15.3 One (1) pair socks (Bobby Lee Holmes)
19. Paper towels

RESULTS OF EXAMINATION(S)

1.1 No semen identified.
1.2 No semen identified, human blood identified.
1.3 Nothing of serological evidentiary value found.
2.1 No semen identified, human blood identified.
2.2 No semen identified, human blood identified.
2.3 No semen identified.
2.4 No semen identified.
3.1 No semen identified.
3.2 Human blood identified. No semen identified.
3.3 No semen or blood identified.
4.4.1 ABO Group "O" PGM subtype 1+.
5.4.1 No analysis conducted.
5.5 No analysis conducted.
5.6 No spermatozoa identified.
5.7 No semen identified.
5.8 No semen identified.
6.3.1 ABO Group "B" PGM subtype 1-1+.

7. No semen or blood identified.
8. No blood identified.
9. Human blood identified PGM subtype 1+ activity detected.
10. Nothing of serological evidentiary value found.
11. Nothing of serological evidentiary value found.
12. Human blood identified, attempts to further characterize the sample were in conclusive. No PGM subtype activity detected.
13. No semen identified. Human blood identified, attempts to further characterize the sample were inconclusive. No PGM subtype activity detected.
14. No blood identified.

15.1 No semen identified. Human blood identified, attempts to further characterize the sample were inconclusive. No PGM subtype activity detected.

15.2 No blood identified.

15.3 Nothing of serological evidentiary value found.

[Defense Exhibit #57]

SOUTH CAROLINA LAW ENFORCEMENT DIVISION FORENSIC SERVICES LABORATORY REPORT

CARROLL A. CAMPBELL, JR.
GOVERNOR

ROBERT M. STEWART
CHIEF

[SEAL]

Serology Department
Additional Report
April 13, 1993
SLED Lab No: L90-0010
Your Case No: Not Listed
Incident Date: 12-31-89
(S) Bobby Lee Holmes
(V) Mary Stewart

Capt. William C. Mobley
York Police Dept.
PO Box 500
York, SC 29745

This is an official report of the South Carolina Law Enforcement Division Forensic Services Laboratory and is to be used in connection with an official criminal investigation. These examinations were conducted under your assurance that no previous examinations of person(s) or evidence submitted in this case has been or will be conducted by any other Laboratory or agency.

Robert M. Stewart, Chief
South Carolina Law Enforcement Division

ITEMS SUBMITTED

1. Brown bag #1 containing:

1.1 One (1) blue and black robe

1.2 One (1) pink nightgown

1.3 One (1) pair flowered bedroom shoes

2. Brown bag #2 containing bedding from victim's bed

2.1 White sheets

.2 Flowered sheet

RESULTS OF EXAMINATIONS

1.1 No semen identified.

1.2 No semen identified. Human blood identified. ABO Group "O"

1.3 Nothing of serological evidentiary value found.

2.1 No semen identified. Human blood identified.

2.2 No semen identified. Human blood identified.

ITEMS SUBMITTED

2.3 Two (2) green pillowcases

2.4 One (1) flowered pillowcase

3. Brown bag #3 containing:

3.1 Pink robe

3.2 Pink nightgown (Mary Stewart)

3 White rag

4. One (1) Sexual Assault Kit (Mary Stewart) taken from Devine Saviour Hospital

4.4.1 Blood

5. One (1) Sexual Assault Kit (Mary Stewart) taken from Charlotte Memorial Hospital

5.4.1 Blood

5.5 Saliva

5.6 Smears (rectal)

5.7 Vaginal swab

5.8 Rectal swab

RESULTS OF EXAMINATIONS

2.3 No semen identified.

2.4 No semen identified.

3.1 No semen identified.

3.2 No semen identified. Human blood identified. ABO Group "O" PGM subtype 1+ activity detected.

3.3 No semen or blood identified.

4.4.1 ABO Group "O" PGM subtype 1+

5.4.1 No analysis conducted.

5.5 No analysis conducted.

5.6 No spermatozoa identified.

5.7 No semen identified.

5.8 No semen identified.

ITEMS SUBMITTED

6. One (1) Sexual Assault Kit (Bobby Lee Holmes) taken from Devine Saviour Hospital

6.3.1 Blood

7. One (1) white rag (bag #7)

8. Brown envelope #8 containing one (1) blue tank top from subject.

9. Brown envelope #9 containing one (1) white paper towel

10. Brown bag #10 containing one (1) black Gamecocks baseball cap (Bobby Lee Holmes)

11. Brown bag #11 containing one (1) pair Nike tennis shoes (black) from Bobby Lee Holmes

12. Brown bag #12 containing one (1) pair Bugle Boy blue jeans from Bobby Lee Holmes

13. Brown bag #13 containing one (1) pair mens white shorts from Bobby Lee Holmes

4. Brown Bag #14 containing one (1) black sweat jacket (Bobby Lee Holmes)

RESULTS OF EXAMINATION

6.3.1 ABO Group "B" PGM subtype 1-1+

7. No semen or blood identified.

8. No blood identified.

9. Human blood identified ABO Group "O" PGM subtype 1+ activity detected.

10. Nothing of serological evidentiary value found.

11. Nothing of serological evidentiary value found.

12. Human blood identified; attempts to further characterize the sample were inclusive. No PGM subtype activity detected.

13. No semen identified. Human blood identified; attempts to further characterize the sample were inconclusive. No PGM subtype activity detected.

14. No blood identified.

ITEMS SUBMITTED

15. Brown bag #15 containing a white plastic bag containing items from Bobby Lee Holmes:

15.1 One (1) blue and white striped shirt.

15.2 One (1) black sweat shirt

15.3 One (1) pair socks

9. Paper towels

RESULTS OF EXAMINATIONS

15.1 No semen identified. Human blood identified; attempts to further characterize the sample were inconclusive. No PGM subtype activity detected.

15.2 No blood identified.

15.3 Nothing of serological evidentiary value found.

19. No semen identified. Human blood identified; attempts to further characterize the sample were inconclusive. No PGM subtype activity detected.

Samples from items 4.4.1, 5.4.2, 6.3.1, 9.1, 12.1, 13, 15.1, and 19.2 were sent to South Carolina Law Enforcement Division's DNA Department on February 12, 1990 for further analysis.

These examinations were conducted by S/A Nancy M. Greene, Forensic Serologist with this Division.

/s/ Nancy M. Greene
Nancy M. Greene
Special Agent

April 3, 1995
Date

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State,
Respondent,

v.

Bobby Lee Holmes,
Appellant.

Appeal From York County
John C. Hayes, III, Circuit Court Judge

Opinion No. 25886
Heard February 19, 2004 – Filed November 1, 2004

AFFIRMED

Senior Assistant Appellate Defender Wanda Haile, of Columbia, for appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia; and Thomas E. Pope, of York, for respondent.

JUSTICE MOORE:

Appellant was convicted[1] of murder, first degree burglary, first degree criminal sexual conduct (CSC), and robbery. He received a death sentence for the murder, the jury having found three statutory aggravating circumstances,[2] and received three concurrent sentences for the other offenses.[3] Appellant alleges errors occurred in both the guilt phase and the sentencing phase of his trial. We affirm appellant's convictions and sentences.

FACTS

At approximately 6:15 a.m. on December 31, 1989, the eighty-six-year-old victim opened her door in response to someone's knocking. A black male forced his way into her apartment, beat her about the chest and head, and demanded money. The man forced the victim into her bedroom where he ripped off her nightgown and anally raped her. He took $40 from her purse and left the apartment after ripping the living room phone from the wall.

At 7:45 a.m., the victim's friend (Mrs. Thrasher) phoned to check on the victim. After six or seven rings, the victim answered and told Mrs. Thrasher she had been beaten, anally raped, and robbed. Mrs. Thrasher called

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[1] This was appellant's second capital trial. His direct appeal from the first trial was affirmed, *State v. Holmes*, 320 S.C. 259, 464 S.E.2d 334 (1995), *cert. denied*, 517 U.S. 1248 (1996); appellant was subsequently granted a new trial on post-conviction relief.

[2] The aggravating circumstances were murder during the commission of burglary, murder during the commission of CSC, and physical torture.

[3] The imprisonment terms were life for burglary; thirty years for CSC; and fifteen years for robbery.

another friend, Mrs. Byers, who had an automobile and a key to the victim's apartment. Mrs. Byers went to the apartment, noticed it was messy, spoke with the victim who told her the assailant was "big and dark," and then drove to the police department since the living room phone had been pulled off the wall.[4]

The first officer on the scene was Dale Edwards. The victim told him that around 6 or 6:30 a.m. she heard knocking at her front door and that when she opened the door, a black male forced his way in. She had taken a shower before the police arrived. Officer Edwards removed the sheets and pillowcase from the bed for use as evidence; and placed the items in a paper grocery bag taken from the victim's kitchen. Lt. Barnett arrived and assisted in the evidence collection. A pink nightgown, a housecoat, and a rag were removed from the bathroom and placed in another grocery bag. The victim gave Officer Edwards a pink paper towel with blood on it that he placed in a manila envelope brought to the scene by Captain Mobley, the third officer on the scene.

While the three police officers were there, two paramedics arrived to transport the victim to a local hospital emergency room. Blood samples were taken, but a rape kit was not processed because the victim was complaining of hip pain and medical personnel were awaiting X-rays before performing the exam. The blood testing kit used to take samples from the victim had "expired" several months earlier.[5] Before the victim's mental state began to

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[4] The victim apparently answered Mrs. Thrasher's call using her bedroom phone.

[5] Appellant includes the use of an expired kit in his argument that the forensic evidence was compromised. There was evidence, however,

(Continued on following page)

deteriorate, she described her attacker to an emergency room nurse as a black male in his late twenties. On February 19, 1990, the victim was transferred to a nursing home where she died in March. The cause of death was pneumonia, which developed as the consequence of her severe brain injury.

Captain Mobley testified he arrived at the victim's apartment as the EMS personnel were transporting her out the door. He took custody of the evidentiary items from Officer Edwards and Lt. Barnett. He sent Officer Edwards door to door in the neighborhood and instructed Lt. Barnett to go to the hospital and speak with the victim.

Lt. Barnett recorded the victim's statement at the hospital emergency room before she became confused. She described her attacker's clothing: "a dark jacket, must have been blue or black, must have been black;" "a pair of those funny looking pants . . . not the old pant, but something that's kind of mixed up you know;" his hair: "kind of long. Not too long, but a little longer than you usually wear it;" she then said: "he was middle aged. He was young. He was not too young. And he, as I remember, his hair was not short or not too long." The victim described her attacker as dark skinned, "not too heavy. Not too slim."

Later that day, Officer Edwards talked to several of the victim's neighbors. Ms. Boyd told him she heard knocking at her door about 3 a.m.; Mr. Lynn, who lived next door to the victim, reported knocking between 5:30 a.m. and 6:30 a.m.; and Ms. Diggs, who lived on the other

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that the expiration date is a manufacturer's "guess" as to how long the vacuum in the blood collection vials will remain good, and that the kit can be used after that date if the vacuum remains effective.

side of the victim, heard someone knocking on her door around 6 or 6:30 a.m.

Officer Grady Harper testified he was dispatched to an apartment complex near the victim's residence at about 4:43 a.m. on December 31, 1989. A number of people, including appellant, were making a disturbance, and Officer Harper told them to quiet down and move on. Appellant was unruly, and Officer Harper called for back-up to assist in arresting appellant. When the additional officers arrived, appellant ran. Officer Harper saw appellant get into a car; Officer Harper gave chase in his patrol car. The driver stopped the car and appellant ran from it. The last time Officer Harper saw appellant was about 5:30 a.m. and the other officers were chasing appellant. One of the "chasing" officers testified he lost sight of appellant at about 5:20 a.m. Appellant was wearing a black sweater with a hood and blue jeans.

Captain Mobley testified that after Officer Edwards and Lt. Barnett left the victim's apartment; he locked the front door and began processing the scene. He seized one more paper towel, the telephone touched by the assailant, and the victim's purse. He then dusted the apartment for fingerprints. On the interior side of the front door he photographed and lifted a palm print located slightly above the doorknob. Captain Mobley also photographed and lifted a print from the outside of the front door. The inside palm print was later identified as that of appellant.

Appellant was arrested on the afternoon of December 31, 1989, at his father's home in York, and denied ever having been inside the victim's apartment. When the police arrived, appellant was wearing a black hooded sweatshirt, underwear, and socks. He dressed in jeans

before being transported by the police. While he was dressing, Officer Boot Smith noticed a tank top that appeared to have blood on it and asked if the police officers could take it. Appellant consented and stated the blood tame from a fight he had been involved in the night before at a bar.

Forensic evidence linked appellant to the crime scene. In addition to the palm print found on the victim's door, the State introduced evidence that:

> (1) fibers consistent with a black sweatshirt owned by appellant were found on the victim's bed sheets;
>
> (2) a blue acrylic fiber was found on the victim's pink nightgown, and another on appellant's blue jeans: they "could have come from the same common source or it could have come from different sources, but indeed they do . . . match each other;"
>
> (3) microscopically consistent fibers were found on the pink nightgown and, in the form of a "fiber pill," on appellant's underwear;
>
> (4) appellant's underwear contained a mixture of DNA from two individuals and 99.99% of the population other than appellant and the victim were excluded as contributors to that mixture; and
>
> (5) appellant's tank top was found to contain a mixture of his blood and the victim's blood.

The defense theory was two fold. First, it sought to discredit the forensic evidence by showing the evidence was mishandled and by demonstrating the many opportunities for contamination because of unprofessional errors.

The defense also sought to suggest that the alleged contamination was not merely the result of simple negligence, but part of a plot on the part of certain law enforcement officers to see that appellant was convicted of these crimes. In connection with this prong of the defense strategy, appellant sought to introduce evidence of third party guilt.

ISSUE

Whether the circuit court erred by refusing to admit evidence of third party guilt?

DISCUSSION

At a pretrial hearing, appellant proffered evidence of third party guilt. Specifically, he sought to introduce evidence at trial that the crimes were actually committed by Jimmy McCaw White (Jimmy).

1. Pre-trial testimony

Like appellant, Jimmy is a black male. At the time of the victim's murder, he was twenty-two years old; appellant was eighteen. Jimmy's hair was longer than appellant's and Jimmy had lighter skin than appellant.

Several witnesses placed Jimmy in the victim's neighborhood near 6 a.m. on December 31, 1989. Frenetta Johnson testified she saw Jimmy going toward the apartments where the victim lived between 4:30 and 5:30 a.m. Later in her testimony, she narrowed the time to "from four-thirty to something to five." Meshelley Gilmore testified she observed Jimmy in an apartment parking lot as she drove away from her home at about 3:30 or 4 a.m., and that he was still there when she returned at 4:30-4:45 a.m. These

apartments were near the victim's complex. Mrs. Gilmore was awakened by a police officer knocking on her door at 7:30 a.m. She told him she had seen Jimmy hanging around the parking lot earlier that morning.

Deloris Brown testified she saw Jimmy walking down the victim's street in the direction of the victim's apartment between 4 and 5 a.m. on December 31, 1989. Eighty-seven-year-old Anna Boyd, a resident of the same apartment complex as the victim, testified that someone knocked on her door during the night of December 30-December 31. The knocker said, "Open the door, my man, this is Jimmy, open the door." These are appellant's "proximity" witnesses.

Appellant also presented several witnesses who testified that Jimmy had acknowledged that appellant was "innocent" or to whom Jimmy had admitted his guilt. Thomas Murray testified that Jimmy said he knew appellant was innocent, and that he (Jimmy) could not be brought to court for it. Ken Rhodes testified he asked Jimmy whether the word on the street, that Jimmy was the victim's murderer, was true and that Jimmy "put his head down and he raised his head back up and he said well, you know, I like older women . . . and he never called the lady's name but you know he say that he liked old women and that yeah he did what they say he did and you know that somebody else was locked up for it. And you know it's like he didn't have no regrets about it at all." Rhodes went on to testify that "[Jimmy] didn't say exactly what he done, he just told me that she had some good stuff. . . . He said that he didn't kill the lady. The lady was alive when he left. . . ."

Mattie Mae Scott testified that in October 1997 she was at her son's house when Jimmy came to visit. Jimmy was "partially intoxicated," and when the others began talking about the 'old lady in York' that Jimmy had raped and murdered, Jimmy said, "Yes, I did it but [appellant] is going to fry for it."

The defense's "star witness" was Stephen Westbrook.[6] He testified that in 1990 and again in 1994 Jimmy told him he had broken into the victim's house and raped her. Jimmy told Westbrook that Officer Boot Smith[7] had told Jimmy to keep quiet about his guilt. Westbrook further testified that Officer Smith and Investigator Potts came to see Westbrook before appellant's first trial and offered to get him out of jail if he would testify that appellant had confessed to him. Westbrook testified that in June 2000, about two months before this pretrial hearing, he was brought to Rock Hill from Kirkland Correctional Institute. In Rock Hill, he was confronted by several employees of the solicitor's office who sought to convince him to testify against appellant in the upcoming second trial. Westbrook stated that the solicitor's office employees acknowledged to him that they had manufactured underwear evidence incriminating appellant. Westbrook also testified that Jimmy told him that Officer Smith was out to "frame" appellant, and that even appellant's former attorney had urged him to testify against appellant. Finally, Westbrook testified an employee of the solicitor's office stated that, in addition to the manufactured underwear evidence, they had lifted one of appellant's palm prints from the county

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[6] Westbrook's credibility was called into question by cross-examination and by impeachment.

[7] Boot Smith was deceased at the time of this trial.

jail door to use against him at trial. These are appellant's "confession" witnesses.

Further, the defense called a witness who testified that when asked why he would not confess, Jimmy told him "it's all over and done with and [appellant] is going to do the time for it."

The former receptionist at the York Public Defender's Office testified that Jimmy brought up the crime in conversation with her one day, and remarked that he did not believe appellant was guilty, that maybe Jimmy knew who did it, and that everybody on the street knew.

Finally, the defense called Jimmy to testify at the pretrial hearing. The trial judge instructed Jimmy he had the right to remain silent and the right to an attorney, and warned Jimmy that anything he chose to say could be used against him. Jimmy declined the offer of an attorney and opted to testify. Jimmy testified he left York and was home in Sharon by 2 a.m. on December 31, 1989. He claimed to have ridden with Junior Lytle. Lytle, however, testified at the pretrial hearing and denied driving Jimmy home to Sharon that night. Jimmy denied telling Stephen Westbrook that he had raped and killed the victim and denied confessing in the presence of Thomas Murray or John Dixon or telling the York Public Defender's receptionist that he knew who killed the victim.

2. Standard for admitting third party guilt

We have held that a defendant seeking to present evidence of third party guilt must meet this standard:

> [T]he evidence offered by accused as to the commission of the crime by another person must be

> limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.

State v. Gregory, 198 S.C. 98, 104, 16 S.E.2d 532, 534 (1941) (citing 16 C.J. 560).

The *Gregory* court went onto cite from 20 Am. Jur. 254:

> But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose. An orderly and unbiased judicial inquiry as to the guilt or innocence of a defendant on trial does not contemplate that such defendant be permitted, by way of defense, to indulge in conjectural inferences that some other person might have committed the offense for which he is on trial, or by fanciful analogy do say to the jury that some one other than he is more probably guilty.

Id., 198 S.C. at 104-105, 16 S.E.2d at 535. Further, in *State v. Gay,* 343 S.C. 543, 541 S.E.2d 541 (2001), we held that where there is strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence.

Appellant fails to meet the standard set out in *Gregory* and *Gay* due to the strong evidence of his guilt. He simply cannot overcome the forensic evidence against him to raise a reasonable inference of his own innocence. This evidence included: (1) appellant's palm print was found just above the door knob on the interior side of the front door of the victim's house; (2) fibers consistent with a black sweatshirt owned by appellant were found on the victim's bed sheets; (3) matching blue fibers were found on the victim's pink nightgown and on appellant's blue jeans; (4) microscopically consistent fibers were found on the pink nightgown and on appellant's underwear; (5) appellant's underwear contained a mixture of DNA from two individuals, and 99.99% of the population other than appellant and the victim were excluded as contributors to that mixture; and (6) appellant's tank top was found to contain a mixture of appellant's blood and the victim's blood.[8]

Further, besides the forensic evidence, there was evidence that appellant matched the description of the perpetrator given by the victim and there was evidence that appellant was fleeing from police officers and was in

[8] Although appellant claims the forensic evidence was mishandled and therefore was inadmissible, the fact the forensic evidence may have been compromised by the unprofessional manner in which the evidence was collected goes to the weight of the evidence, not to its admissibility. *See State v. Carter*, 344 S.C. 419, 544 S.E.2d 835 (2001) (weak links in chain of custody go to weight, not admissibility); *State v. Smith*, 326 S.C. 39, 482 S.E.2d 777 (1997) (storage of blood sample in police officer's home goes to weight of evidence not its admissibility). In any event, appellant's claims do not eviscerate all of the forensic evidence. For example, appellant's claims do not eliminate the fact that consistent fibers were found on both his clothing and the victim's clothing and sheets or the fact that 99.99% of the population other than appellant and the victim were excluded as contributors to the mixture found in appellant's underwear.

the area of the victim's house prior to the time she was attacked.

Regarding appellant's claim that he should have been allowed to present evidence that Jimmy White may have been the perpetrator of the crimes, the State proffered the testimony of a Federal Bureau of Investigations forensic examiner. This examiner testified that, after testing Jimmy White's specimen, *i.e.* a dried bloodstain, and comparing the specimen to the clothing items that were tested as part of the investigation, White was excluded.

Given the overwhelming evidence of appellant's guilt, the circuit court did not err by excluding the evidence of third party guilt.

CONCLUSION

Appellant's remaining issues are without merit and we dispose of them pursuant to Rule 220(b), SCACR. *See Issue I*: *State v. Council*, 335 S.C. 1, 515 S.E.2d 508, *cert. denied*, 528 U.S. 1050 (1999) (whether juror is qualified to serve on death penalty case is within discretion of trial court and is not reviewable on appeal unless wholly unsupported by the evidence; responses of challenged jurors must be examined in light of entire voir dire); *Issue IV*: *State v. Johnson*, 338 S.C. 114, 525 S.E.2d 519, *cert. denied*, 531 U.S. 840 (2000) (appellate court will not disturb trial court's ruling concerning scope of cross-examination of a witness to test his or her credibility absent manifest abuse of discretion); *see also State v. Beckham*, 334 S.C. 302, 513 S.E.2d 606 (1999) (trial court erred by not admitting impeachment evidence after officer denied he had investigated two suspects different from the defendant; however, error found to be harmless); *Issue VI*:

State v. Humphries, 325 S.C. 28, 479 S.E.2d 52 (1996), *cert. denied*, 520 U.S. 1268 (1997) (contemporaneous objection required to preserve issue for appellate review); *Issues VII and VIII*: *State v. Hughes*, 336 S.C. 585, 521 S.E.2d 500 (1999), *cert. denied*, 529 U.S. 1025 (2000) (capital defendant may present as mitigating evidence (1) any aspect of defendant's character or record and (2) any circumstances of the crime that may serve as a basis for a sentence less than death); *State v. Southerland*, 316 S.C. 377, 447 S.E.2d 862 (1994), *cert. denied*, 513 U.S. 1166 (1995)[9] (residual doubts are not a mitigating factor in sentencing); *Issue IX*: *Ohio v. Roberts*, 448 U.S. 56 (1980), *overruled on other grounds by Crawford v. Washington*, ___ U.S. ___, 124 S.Ct. 1354 (2004) (properly administered the business and public records exceptions are among the safest against a Confrontation Clause challenge of the hearsay exceptions); Rule 1006, SCRE (contents of voluminous records may be presented in form of a summary provided underlying data are admissible into evidence); *State v. Whipple*, 324 S.C. 43, 476 S.E.2d 683, *cert. denied*, 519 U.S. 1045 (1996) (prison disciplinary records admissible under Uniform Business Records as Evidence Act, S.C. Code Ann. § 19-5-510 (1985); *Issue XI*: *Payne v. Tennessee*, 501 U.S. 808 (1991) (victim impact evidence is admissible in a capital sentencing proceeding); *Neill v. Gibson*, 278 F.3d 1044 (10th Cir. 2001), *cert. denied*, 537 U.S. 835 (2002) (no *ex post facto* violation in allowing victim impact evidence when crime occurred in 1984); *Issue XII*: *State v. Humphries*, 325 S.C. 28, 479 S.E.2d 52 (1996), *cert denied*, 520 U.S. 1268 (1997) (contemporaneous objection required

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[9] *Overruled on other grounds by State v. Chapman*, 317 S.C. 302, 454 S.E.2d 317 (1995).

to preserve issue for appellate review); *Issue XIII*: *State v. Stroman,* 281 S.C. 508, 316 S.E.2d 395 (1984) (party cannot complain of error which his own conduct has induced); *Issue XV*: *State v. Weik,* 356 S.C. 76, 587 S.E.2d 683 (2002), *cert. denied,* 539 U.S. 930 (2003) (issues cannot be raised for the first time on appeal); *State v. Saltz,* 346 S.C. 114, 551 S.E.2d 240 (2001) (admission of evidence is in trial court's discretion and will not be disturbed on appeal absent an abuse of discretion).[10]

Proportionality Review

Under State law, S.C. Code Ann. § 16-3-25(C)(3) (1985) requires this Court to determine in a death case "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." There is no requirement the sentence be proportional to any particular case; however, death sentences have been imposed in similar cases. *See State v. Simmons,* ___ S.C. ___, 599 S.E.2d 448 (2004); *State v. Terry,* 339 S.C. 352, 529 S.E.2d 274, *cert. denied,* 531 U.S. 882 (2000); *State v. Council,* 335 S.C. 1, 515 S.E.2d 508, *cert. denied,* 528 U.S. 1050 (1999); *State v. Whipple,* 324 S.C. 43, 476 S.E.2d 683, *cert denied,*

[10] As for Issue XIV, appellant's argument is based upon a factual error. Appellant argues the trial court erred by permitting the State to cross-examine a social worker using records from his stay in Gilliam Psychiatric Hospital in 2000. However, the trial court in fact denied the State's request to cross-examine the social worker and the State did not ask any questions regarding the 2000 Gilliam records. Because the Record on Appeal does not support appellant's assertion, we do not address his argument. *See State v. Sinclair,* 275 S.C. 608, 274 S.E.2d 411 (1981) (where appellant obtained only relief he sought, this court has no issue to decide).

519 U.S. 1045 (1996). Accordingly, appellant's sentence is not disproportionate under State law. The judgment of the circuit court is **AFFIRMED.**

TOAL, C.J., WALLER, J., and Acting Justice John W. Kittredge, concur.

PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES:

I respectfully dissent, and would find the circuit court erred in refusing to allow appellant to introduce evidence of third party guilt in the guilt phase of the trial. I would therefore reverse and remand for a new trial.

The majority and I agree on the third party guilt evidence proffered by appellant. In my view, the proffer met the standard established by *State v. Gregory,* 198 S.C. 98, 16 S.E.2d 532 (1941). The majority, relying on *State v. Gay,* 343 S.C. 543, 541 S.E.2d 541 (2001), concludes that the third party guilt evidence was properly excluded. I find *Gay* distinguishable.

In *Gay,* the Court affirmed the exclusion of evidence of third party guilt because the State's case, particularly the forensic evidence, was so strong that it admitted of no "reasonable inference" regarding the defendant's innocence. The present case is distinguishable from *Gay* in several important particulars. First, the validity of the forensic evidence was not called into question in *Gay.* Here, appellant presented evidence of mishandling, for example the collection of evidence at the scene using grocery bags from the victim's kitchen, the mislabeling of samples at the lab, and the loss of all blood samples collected from the victim. Further, appellant proffered evidence that representatives of the State had admitted

manufacturing blood and palm print evidence against him. Finally, unlike the defendant in *Gay*, appellant proffered both "proximity" witnesses and "confession" witnesses. Considering the record as a whole, the State's evidence was not sufficient to negate the "reasonable inference" of appellant's innocence arising from appellant's proffer.

I would reverse and remand for a new trial.

[SEAL]

THE SUPREME COURT OF SOUTH CAROLINA

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December 1, 2004

Acting Deputy Chief Attorney Wanda P. Hagler
Office of Appellate Defense
1205 Pendleton Street, Rm. 306
Columbia, SC 29201

Re: The State v. Holmes, Bobby Lee

Dear Counsel:

The Court has issued the following Order on your Petition for Rehearing in the above matter:

"Petition for Rehearing is denied.

/s/ Jean H. Toal C.J.

/s/ James E. Moore J.

/s/ John H. Waller, Jr. J.

Justice E. C. Burnett, III, not participating

I would grant rehearing.

/s/ Costa M. Pleicones J.

December 1, 2004."

The remittitur is today being forwarded to the lower court.

Very truly yours,

/s/ [Illegible]
CLERK

DES/dmh

cc: Assistant Deputy Attorney General Donald J. Zelenka
The Honorable Thomas E. Pope